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RIPARIAN RIGHTS IN WISCONSIN

BRIEF ON THE NATURE AND SCOPE OF RIPARIAN RIGHTS
IN WISCONSIN AND LIMITATIONS THEREON GROWING
OUT OF THE PUBLIC NATURE OF THE WATER

BY

EUGENE ALLEN GILMORE

*Professor of Law in the Law School
of the University of Wisconsin*

DECEMBER, 1909



PRESENTED BY MR. LA FOLLETTE

MARCH 23, 1910.—Ordered to be printed

WASHINGTON
GOVERNMENT PRINTING OFFICE
1910

Eng 929.10.7

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NOTE.—This brief in its present form was prepared at the request of the special joint committee of the Wisconsin legislature of 1909, appointed to investigate the subject of the control of water powers by the State and to recommend legislation thereon to a special session. An earlier brief prepared on the same subject at the request of members of the Wisconsin Senate Committee on Forestry has been incorporated here. The subject is discussed primarily with reference to the law of Wisconsin. No attempt has been made to examine exhaustively the decisions of other jurisdictions. They are considered in so far as they bear upon the local problem. The quotations from the treatises and cases have been made unusually full in order that the material might be readily accessible. While the subject-matter of the brief is in the main of local interest in Wisconsin, its fundamental propositions, however, are of general application in other jurisdictions.

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CONTENTS.

	Page.
1. Syllabus.....	7
2. Basis of a riparian right.....	16
3. Nature of riparian rights.....	17
4. Nature of the right essentially relative.....	18
5. Scope of riparian rights.....	19
6. Right to the benefit and advantage of the fall of the stream—the water power.....	19
7. The mill acts: Their necessity and purpose.....	21
8. Conclusion with respect to the relative rights of riparian owners to use water for power.....	23
9. Enjoyment of the riparian rights in relation to the rights of the public...	23
10. Restrictions upon the riparian rights because of the public right of navigation.....	24
11. Dams or obstructions in navigable streams are nuisances.....	28
12. Conclusion drawn as to the effect upon the private riparian rights because of the existence of the paramount public right of navigation.....	32
13. Basis of state control.....	35
14. Restrictions upon the riparian rights because of the public right of use for purposes broader in scope than for mere navigation.....	37
15. The status of waters in Wisconsin: In general.....	38
16. Public and private waters.....	38
17. Extent of the crown title.....	39
18. Nontidal or fresh waters.....	40
19. Navigable in fact: Navigable in law.....	41
20. Basis of the public right of use beyond the tide.....	42
21. Status of waters in the United States.....	44
22. Public waters in Wisconsin.....	45
23. Origin and nature of the riparian owner's title to the bed.....	46
24. Burden of limiting the public right of use to navigation merely is upon the riparian proprietors.....	50
25. Scope of the public right of use.....	50
26. Public right of use is not an easement merely.....	51
27. Uses to which public waters may be put: Characteristics of public waters..	53
28. Compensation to riparian proprietors.....	59
29. The right to improve public water for hydraulic power is a franchise.....	60
30. Cases distinguished.....	61

THE NATURE AND SCOPE OF RIPARIAN RIGHTS IN WISCONSIN AND LIMITATIONS THEREON GROWING OUT OF THE PUBLIC NATURE OF THE WATER.

SYLLABUS.

1. The purpose of this brief will be to consider: (I) The nature and scope of riparian rights in general and their exercise and enjoyment, as between riparian proprietors, unaffected by the existence and exercise of rights in the public to use the water and without regard to whether the water be public or private; (II) to consider the nature and scope of such rights and their enjoyment as against the public, and the effect which the existence and exercise of the public rights of use of the water has in limiting or destroying the private riparian rights. Under II the limitation upon or destruction of the private riparian rights by the existence and exercise of the public right will be considered, (1) on the assumption that the public right of use extends no further than navigation, and fishing as an incident thereto; (2) on the assumption that the public right of use extends to the use of the water for all legitimate public purposes. Throughout the discussion the following classification of waters in Wisconsin is intended to be adhered to: (a) Nonnavigable and nonmeandered waters; (b) navigable nonmeandered waters; (c) navigable meandered waters. In considering riparian rights in general under I above, all statements and quotations as to the nature and scope of these rights are to be confined to those waters in which the public has no rights of use—such waters in Wisconsin as are included under (a) above—for it is only in such waters that the riparian rights exist unaffected by the rights of the public. In all waters included in (b) and (c), in which the public has a right of use, the existence and scope of the private riparian rights and their exercise is held to be in all respects subordinate to the existence and exercise of the public right. The riparian use of the water in class (c) for hydraulic power can only be made under express authority from the State. In class (b), until further legislation, where such use is practicable without the right of eminent domain, it may be made without express authority from the State, but subject at all times to state prohibition in the interests of the public rights of use.

2. Where land touches a body of water certain rights are recognized in the landowner to use the water in connection therewith, which rights are different from those belonging to the public generally. These are called riparian or bank rights. Such rights exist by virtue of the ownership of the bank in contact with the water, and not by virtue of the ownership of the soil under the water. Riparian rights can not grow out of the ownership of the submerged soil. The Wisconsin decisions recognizing the title to submerged soil

of rivers and streams to be in the owner of the banks do not enlarge the scope of the riparian rights of such owner.

3. The riparian right pertains not to the water itself, but to the use of it as it passes along. As between riparian owners, unaffected by the rights of the public, every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run, without diminution or alteration. No proprietor has a right to the use of the water to the prejudice of other proprietors above or below him unless he has a prior right to divert it or a title to some exclusive enjoyment. He has no property in the water itself, but a simple *usufruct* while it passes along. Though he may use the water while it runs over his land as an incident to the land, he can not unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors he can not divert or diminish the quantity of water which would otherwise descend to the proprietors below nor throw the water back upon the proprietors above without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it.

4. As the right pertains merely to the use of water, and as all riparian proprietors have the same corresponding right to use the same water to the same extent, no riparian proprietor has an absolute and exclusive right of use, because no right which is shared equally by an indefinite number of persons can be an absolute one. The enjoyment of the right is necessarily relative, and is restricted and interfered with by the like enjoyment of the same right in other riparian owners, and on navigable waters is subordinate to the rights of the public.

5. All navigable waters, in addition to being subject to equal use by all riparian owners, are also subject to use by all members of the public. This public right of use is fundamentally different from the private right of use by the riparian proprietors. As between riparian proprietors, the right of use is equal and correlative, each riparian proprietor being entitled to enjoy his riparian rights, subject only to the restrictions and limitations growing out of the pursuit of the equal right by other riparian proprietors. As between riparian proprietors and the public, the public right of use is paramount and may be enjoyed to the total exclusion of the private right. The extent of the subjection of the riparian right to the public right will depend upon the scope and content of the public right. Whatever its scope and content, its existence and exercise necessarily result in some restrictions upon, which may produce total destruction of, the private right.

6. The private riparian right must be enjoyed consistently with a like enjoyment of the same right in other riparian owners, and subordinate to the exercise of the public right. For this reason the existence and scope of the riparian right is contingent and indefinite, and in that respect it differs essentially from an ordinary property right.

7. As between riparian proprietors, unaffected by the existence or exercise of the public right of use, the scope of the riparian right, in general, includes the following: The right of access to the water, and this on all navigable streams would permit of building wharves, piers,

or other structures in the water to reach the navigable portion of the stream; to have the stream continue in its customary place or channel; to have it continue to flow as it is wont with respect to volume, rate, and evenness; to have the water remain in a reasonably pure condition; to enjoy the right of alluvion, reliction, and avulsion, and the products of the water, such as ice and fish; the right to the power incident to the fall of the water. But the existence and exercise of all such rights in navigable waters are subordinate in all respects to the public right of use.

8. While the exercise of all riparian rights is qualified and restricted because of the indefinite number of persons who are entitled to share equally in such rights, the use of the water for power is especially subject to qualifications and restrictions by reason of the natural tendency which such use has to produce an interference with the paramount public right and with the enjoyment of a similar use by other riparian owners and an invasion of their private property rights.

9. As between riparian proprietors, unaffected by the existence and exercise of the paramount public right of use of water and the public nature of the water, every proprietor on either bank is entitled to the benefit of the water as it subsists in its *natural* state. It follows, then, that no single proprietor without consent has a right to make use of the flow in such a manner as will be to the prejudice of any other; and that he has no more power to apply it to a purpose which occasions a return of the water on the land *above* than he has to cause a diminution of the water *below*. He can not alter the level of the water, either where it *enters* or where it *leaves* his property. As against other riparian proprietors or private parties, but not as against the State, or as in any respect interfering with the existence or exercise of any public right of use of water, the water power to which a riparian owner is entitled consists merely of the fall in the stream when in its *natural* state, as it passes through his land or along the boundary of it; or, in other words, it consists of the difference of level between the surface where the stream first touches his land and the surface where it leaves.

10. As between riparian owners strictly, unaffected by the existence and exercise of public rights in the water, the creation of a water power, however, usually involves something more than the possession of a sufficient fall within the limits of a single riparian proprietor. The maxim is that each riparian is entitled to have the water flow as it is accustomed to *flow* in its *natural* state. The use of the water for power necessarily involves an interference with the flow of the stream and is *prima facie* a violation of the maxim. But this right to have the flow uninterrupted is subject to a reasonable interference. As between riparian proprietors strictly, unaffected by the existence and exercise of the public rights in the water, each riparian has a right to check the flow long enough to accumulate a head of water sufficient to run his machinery; this interruption must be reasonable and enjoyed in relation to a similar right in the adjoining riparian owners. Every unreasonable interference with the flow is an invasion of the property right of adjoining riparian owners, and subjects the author of such interference to an action for damages. The right of interruption extends to *impounding* the water for a reasonable time. But such impounding must be done with due

regard to the rights of other riparian owners. Likewise, the manipulation of the flow, by retarding or accelerating it, can only be done so as not to interfere unreasonably with the rights of the adjoining owners.

11. As between riparian owners, a water power, therefore, so far as it pertains to a riparian owner's land, is a potentiality—a possibility. A riparian has no right to a water power as such. He has as against other riparian owners, or third parties, but not as against the State, a right to the natural and customary flow of the stream and to make a reasonable interference with the flow. If the stream in its natural condition, with a reasonable interference with its flow, will produce a practical amount of power, then as against other riparian owners or third parties, but not as against the State, such beneficial use belongs to the riparian. If, however, in order to get sufficient power he is obliged to change in the least degree the natural level of the water or interfere unreasonably with or manipulate its flow, or in any way interfere with or invade the public right of use, he has no water power, for this would involve an invasion of the reciprocal rights of the adjoining riparian owners, and would be an encroachment upon the paramount public right of use.

12. In very many situations there will not be found within the limits of the land of a single riparian owner a sufficient fall of the stream in its natural condition to produce a practical amount of power, or such power can not be made available without an unreasonable interference with the flow. A change in the natural level of the stream or an unreasonable interference with its flow, is an encroachment upon the rights of other riparian owners, and constitutes a tort, subjecting the party guilty to liability for damages. On navigable streams, such acts would involve an invasion of the public right of use, and could be done only under state permission and control. The development of effective water power, therefore, within the limits of an ordinary riparian proprietor is, in most cases, impracticable without an encroachment upon the rights of others. Authority to invade the riparian rights and the lands of others can only be obtained by grant from such others. If they refuse, the development of a water power within the limits of one's own land will not be possible, without the aid of the State. Because of the practical difficulty of obtaining power by the exercise of strictly riparian rights and the difficulty of obtaining the necessary consent of adjoining landowners, there was enacted in Massachusetts and many other States, what are known as the "mill acts." The purpose of these acts was to permit a riparian owner, by making artificial changes in the level of the stream, to back the water upon the upper riparian owner and flood his land, paying damages for the injury thereby inflicted. In Wisconsin the mill act is limited to nonnavigable streams. On navigable streams the development of power was made possible by charters to improve navigation. The effect of the mill acts is to enable a riparian owner on nonnavigable streams who has not within the limits of his own land an adequate water power, to acquire such a power by changing the natural level of the stream in such a way as to interfere with the property rights of the other riparian owners. Such a change results in the flooding of the upper land and is practically a taking of it. As only the State can take private property for public purposes, and as such power is a preroga-

tive of sovereignty only, the grant of such power to an individual constitutes a franchise. A water power, therefore, which is made possible by reason of the authority conferred by the State does not result from the exercise of riparian rights as such, but from the rights under the state grant.

13. As between the riparian proprietors solely, unaffected by the rights of the public and unaffected by the public nature of the water, before a water power can properly be included as a riparian right two things must appear: (1) That the difference in the natural level of the water from the point where it enters the riparian owner's land to the point where it leaves will produce sufficient momentum or fall to turn machinery; (2) that such momentum or fall can be rendered available without an unreasonable obstruction, detention, acceleration, or manipulation of the flow of the stream. If these factors are present, then a water power is the result of the exercise of a riparian right. If these factors are not present, then a water power is not a riparian right, for no man can be said to have a water power which can be produced only by encroaching upon the rights of others. A water power which can be produced only by an artificial change in the natural level of the stream or by an unreasonable obstruction, detention, acceleration, or manipulation of the flow is not *riparian* property, but originates either in voluntary grant from other riparian owners or in an authority from the State to appropriate the property of other riparian owners, in which latter situation the water power results by virtue of the state grant, and not by virtue of the riparian proprietorship.

14. In addition to the restrictions and limitations upon the exercise of riparian rights by reason of the existence of similar rights in other riparian owners, further restrictions upon the enjoyment of such rights on navigable streams grow out of the existence of the public right of use. It is well settled that in streams of sufficient size to be navigable the public has some rights. The extent of the restriction upon riparian rights which the existence of the public right produces depends upon the scope of the public right. If the public right of use be extended no further than the use for navigation, the riparian rights may suffer substantial restriction or total destruction by the exercise of this public right. The right of access; to have the stream remain in its usual place and to flow in its customary way; to use the water for power, have all been seriously impaired or destroyed in Wisconsin by the exercise of the paramount public right of navigation. Also the right of fishery, a valuable riparian right, has been held to be subject to the public right of use.

15. By reason of the existence of the public right of use of navigable rivers for navigation, any obstruction placed in or over such rivers is a nuisance, and is subject to be abated after the manner of all public nuisances. In navigable meandered streams, such obstructions are made illegal by section 1596, Wisconsin Statutes (1898), unless previous permission is obtained from the State. Therefore, on navigable meandered streams the use of the water for hydraulic power is possible only by permission from the State. The provisions of section 1596 could be extended to all waters navigable in fact, whether meandered or not, but until thus extended, obstructions may be put in nonmeandered navigable streams, subject, however, at all times to abatement as nuisances if they interfere with the

public right. While such obstructions in the form of dams in non-meandered rivers for water power are not per se illegal, nevertheless, unless by means of them the riparian owner is able to get a practical amount of fall within the limits of his own land, he will be obliged to seek the aid of the State's prerogative of eminent domain.

16. Section 1596, Wisconsin Statutes (1898), forbidding obstructions in or over navigable meandered rivers without permission from the legislature, has been the law of the State for over fifty years. It was held in 1872 that, irrespective of whether or not a dam interfered with navigation, it could not be maintained without legislative authority. For over fifty years riparian owners have been seeking state permission to place dams in navigable rivers. The state authority to build such dams has not been given for the sake of enabling a riparian owner to obtain a water power, but in the majority of cases has been for the purpose of fitting the stream for the public use of navigation. The water power has resulted merely as an incident to the improvement of the public use. Riparian owners, therefore, have not in the past, by the exercise of their strict legal riparian rights, been enjoying the use of water for power. Practically all of the existing water powers on navigable streams came into existence and continue to exist as an incident to the improvement of rivers for navigation and must stand or fall with this public work, or were the results of the exercise of rights under a special charter conferring upon the grantee the State's prerogatives.

17. By the mill act, applicable to nonnavigable streams, by special charter conferring the same general rights as were granted in the mill act, and by the charters to improve navigation, riparian owners have been granted the State's prerogative of eminent domain, and with its aid have been able to obtain water power. The State can not grant its prerogative of eminent domain except to promote a public purpose. The constitutionality of the mill act was sustained on the ground that the development of the mill sites serve a public purpose, and, further, because such mills were made public mills by statute. The constitutionality of the grants to improve navigation must be based upon the promotion of the public use of the water for navigation or upon some broader scope of public use of the water. If, however, the public use extends no further than navigation, then the State can grant its prerogatives only to promote this one public use, in which event the work, being public, will be subject to public control. If the riparian owners had in the past kept, and will in the future keep, within their strict rights as riparian owners, asking no aid from the State for its prerogatives, effective water powers will seldom result as an incident to riparian ownership. Unless riparian proprietors are able to do in the future what they have not done in the past, viz, procure efficient water power by the exercise of their strict riparian rights, and without encroaching upon the paramount public rights, they will of necessity seek the State's aid in the form of the grant of eminent domain, under the mill act or under a charter to perform the public work of improving the stream for navigation. In either event, the water power will result from the franchise and not from the riparian right, and will come into existence on such terms and conditions as the State may see fit to impose.

18. Even if the riparian proprietor is able to procure efficient water power by the exercise of his riparian rights, he must do so in

subordination to the public use of the stream for at least navigation. This right of the public being paramount, the exercise of it may entirely destroy the private right without compensation, for the State can not be made to pay for loss to the riparian owner due to the exercise of the conceded public right. The State may, therefore, in the future as in the past, create corporations to perform the work of improving navigation and confer upon them the State's prerogatives. The time, place, and manner of such improvements is for the legislative judgment and discretion, which are controlling and can not be drawn in question by any private parties, except in extreme and colorable cases. The legislature may direct its work of improving navigation in such a way as to produce water power. In the past the water power which has resulted as an incident to the improvement of navigation has been used for private manufacturing purposes. Such disposition of the power was not necessary. It may be retained by the State as an integral part of the improvement and used for the public to serve any legitimate public purpose.

19. If the scope of the public right of use of navigable waters is broader than the use for navigation merely, then the scope of the riparian rights is correspondingly narrower. Ascertainment of the scope of the public rights in navigable waters will depend upon the distinction between private and public waters and an examination of the characteristics of the public waters.

20. Navigable waters of Wisconsin have all the incidents, with respect to use and enjoyment thereof, as tidal waters at common law.

21. Tidal waters at common law were public waters. Their public character was twofold: (1) As to use, (2) as to title to the soil beneath them and the shore adjoining between high and low water mark.

22. Such waters were a part of the community or collective property available only for collective use and enjoyment.

23. The title to the soil and the right of use vested in the Crown, in its representative or governmental capacity, for the people. Although the Crown had a private or proprietary interest, *jus privatum*, this was always subject to the public right of use and title, *jus publicum*. The proprietary or private interest of the state to public waters has been repudiated in this country and especially in Wisconsin.

24. Tidal waters in England comprised most of the waters of importance to the public for navigation, commerce, and fishing. By reason of this fact, and the fact that the chief use of waters during the period of the law's development was navigation, the navigability of waters became the test of their public character. Navigable waters were tidal and tidal waters were navigable. The two terms were used interchangeably and the test of public waters was found in the word "navigable" or "tidal."

25. The chief interest of the public in the water was not the tide but its navigable character; hence, navigability in fact was the test of the public right of use of water, and all waters which were navigable in fact were subject to the public right of use.

26. Because there was little important navigable water beyond the effect of the tide, and because of the opposition to the extension of the Crown's title to rivers, the beds of which had been immemorially in private ownership, the scope of the Crown's title to the soil beneath waters was limited by the tide. As far as the tide was felt the Crown

held the right of title to the bed and the right of use in the water. But there were some navigable nontidal waters. To make navigability in fact the test of the King's title and right of use would extend the Crown's property unduly. To avoid this consequence, the fiction "navigable in law" was created, which meant that for the purpose of determining the scope of the King's title to the soil, no waters would be considered navigable beyond the tide. As to waters navigable in fact beyond the tide, the public right of use extended. The scope of this right of use and the basis of it were always obscure and were never made clear until long after the independence of the United States. In England the basis was said to be an easement founded on prescription, but this explanation is wholly inapplicable to conditions in the United States.

27. In the United States, by reason of the presence of large bodies of fresh water, navigability in fact was made the test of public waters, both as to title to the soil beneath them and the right of use of them. By the policy of the Federal Government and the decisions of the Federal Supreme Court all waters navigable in fact are public both as to title to bed and use. All waters in the federal public domain are public in this sense.

28. All navigable waters in the Northwest Territory were public and were held by the Federal Government in its sovereign and governmental capacity subject to all the beneficial uses of public waters at common law.

29. These waters and the title by which they were held passed to the State of Wisconsin upon her admission into the Union, subject to all the incidents of public waters at common law, both as to title to the soil and the public right of use.

30. All navigable waters in Wisconsin, except rivers, are public both as to title to the soil beneath them and the public right of use.

31. In England "navigability in law," or the equivalent expression "tidal," was the test of public waters. The change from the English test to "navigable in fact" was made in this country because of the presence of large rivers and bodies of fresh water, which, if the English test were followed, would be private waters. The logical consequence of this change of test made all waters public which were navigable in fact, thereby extending greatly the scope of public water. This consequence has followed with respect to all waters held by the Federal Government and with respect to all waters held by the State of Wisconsin except rivers. With respect to rivers, the Wisconsin supreme court, shortly after the admission of the State, while professing to adopt the change in test of what constitutes public water, and while following the test in the case of lakes and other bodies of water, held, in construing the rights of a grantee of land bordering upon a navigable stream, that rivers, not being navigable *in law*, that is, being nontidal, the beds thereof were vested in the riparian proprietors. This construction, however, did not change the character of the *water* from public to private. There is no decision holding that as a result of such construction the waters flowing over the land thus judicially recognized to be in the riparian owner lost any of the incidents of public waters at common law. Moreover, this result does not necessarily follow from such construction. There is no decision indicating what effect, if any, upon cutting down the public nature of water such construction will have. There is, on the other hand,

much in the court's decisions to indicate that the public right of use has in no way been impaired by this construction.

32. The riparian proprietor's title to the beds of streams does not proceed from any grant from the Federal Government or the State, but exists merely by reason of judicial declaration.

33. The beds of such streams having been originally vested in the State in trust for all beneficial public uses to which waters could be put, and such title being held in its governmental or sovereign capacity, could not be parted with freed from such trusts. Any title, therefore, which riparian proprietors may have acquired to the beds of navigable waters is subject to all the public rights which existed when such title was in the State.

34. The State held the right to use such water for any legitimate public purpose. The riparian proprietor's title is held subject to the same uses. The scope of this paramount public right of use has never been exhaustively determined. It has been decided that it extends to the use of the water for navigation, fishing, and taking of ice. It has never been decided that the public right of use extends *only* to navigation and fishing. It has never been decided that it does *not* extend to the use of such waters to develop hydraulic power for public purposes.

35. Wisconsin, upon her admission to the Union, acquired title to the beds of all lakes, ponds, and navigable rivers and the waters thereunder in trust for all public purposes. The riparian owners derive title to the lands bordering on navigable waters under patents from the United States. It is claimed that the right to use the water for power is parcel of the riparian estate and is included in the grant of the upland. What rights the patentee took under his patent to riparian land is a question of interpretation and construction. The burden is upon the patentee to establish the scope of his rights under the grant. The rule is well settled that grants by the sovereign are to be construed strictly against the grantee. Those who claim in derogation of the common right must establish their claim in clear and unequivocal terms. Nothing is to be taken by implication. Those who contend that the grant of the upland carried with it all riparian rights, subject only to the right in the public for navigation, should establish their contention by something more tangible than implication and inference.

36. The scope of the public right of use is not defined by "right of navigation and fishing." These are words of *description* merely and not words of *definition*. The scope of the right is defined by "all beneficial uses to which the water can be put for the public." Navigation, fishing, taking of ice, etc., are examples merely.

37. The public right of use of water is not an easement merely. By changing the test of what constitutes public water from tidal to navigability in fact, no change in the nature and scope of the public right of use was made. Public waters were none the less public as to use under the new test. The word "navigable" was used to test the *nature* of the water, whether public or private; not to test the *scope* of the public right of use in waters found by such test to be public. While navigability in fact was made the test of what constitutes public waters, it was not made the test of the scope of the public *use* of such waters.

38. The distinction between private waters and public waters is fundamental, and consists of this: That private waters are private in all respects, but subject, when navigable, to an easement of passage for the public; while public waters are such as are subject to use by the public for all legitimate public purposes. It is immaterial by what method the water becomes public. In Massachusetts the result was reached, as to the great ponds, by the ordinances of 1641-1847; in Washington by constitutional declaration; in Wisconsin by judicial decision, following the decisions of the United States Supreme Court and of other courts, changing the test of what constitutes public water from the tidal character of the water to its navigable quality. When once the status of the water is established as public, it becomes subject to use by the public for all legitimate public purposes.

39. Up to the present time the principal use made of waters by the public pursuant to its right of use has been navigation. Now that their use for that purpose is ceasing to be of prime importance, the legislature may say that these waters, which have all the incidents of public waters at common law and the beds of which were once vested in the State in trust for all legitimate public purposes, shall be turned to an equally important public use, namely, the development of hydraulic power for public purposes.

40. As in the improvement of waters to permit the public use of them for navigation, no compensation was necessary to the riparian proprietor so long as the work and its effects were confined within the banks of the stream, so in the improvement of waters to permit the public use of them for hydraulic power no compensation to riparian owners is necessary, so long as the work is confined within the banks; for any land appropriated or flooded outside of the banks, belonging to riparian owners, compensation must be made under the principles of eminent domain.

41. The right of the public use of waters for hydraulic purposes is held by the State in its sovereign and governmental capacity. In making the water available for this purpose the State may act through individuals or corporations. A grant from the State to individuals or to corporations of the right to erect dams or other structures in navigable streams for the purpose of developing hydraulic power for legitimate public purposes is a franchise and is subject to all the characteristics and incidents of franchises in general.

THE NATURE AND SCOPE OF RIPARIAN RIGHTS AND LIMITATIONS THEREON GROWING OUT OF THE PUBLIC NATURE OF THE WATER.

I.

Basis of a Riparian Right.

Where land adjoins a body of water, certain rights are recognized in the owner of the land to use the water in connection therewith, which rights are different from those belonging to the public generally. These are called riparian or bank rights.

The rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturæ*, because his land has by nature the advantage of being washed by the stream; and if the facts of nature constitute the foundation of the right, I am unable to see why the law should not recognize and follow the course of nature in every part of the same stream. * * * With respect to the ownership of the bed of the river,

this can not be the foundation of riparian rights properly so called, because the word "riparian" is relative to the bank, and not to the bed of the stream, and the connection, when it exists, of property on the banks with property in the bed of the stream depends not upon nature, but on grant or presumption of law. * * * The title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of the stream, which can only be appropriated by severance, and which may be lawfully so appropriated by everyone having a right of access to it. It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream; but lateral contact is as good, *jure naturæ*, as vertical. (Lord Selborne in *Lyon v. Fishmongers' Co.*, 1 App. Cas., 662, 682, 683.)

The foregoing statement has been embodied in the law of Wisconsin: *Delaplaine et al. v. C. & N. W. Ry. Co.* (42 Wis., 214; [1887]).

Therefore, riparian rights, as they exist independently of the ownership of the submerged soil, are in no way affected by such ownership. Wisconsin decisions recognizing the title to submerged soil of rivers to be in the owner of the banks do not enlarge the scope of the riparian rights of such owner.

As riparian rights pertain to the bank, riparian rights can not grow out of the ownership of the submerged soil. (*United States v. Morris*, 24 Wash. L. Rep., 168; *Weber v. State Harbor*, 18 Wall., 57; *Turner v. People's Ferry Co.*, 22 Blatchf., 272.)^a

Nature of Riparian Rights.

A riparian right pertains not to the water itself, but to the use and flow of the water as it passes. It is not his own as to property, but only as to the use he can make of it in its passage. The water is not subject to ownership, for it—

is a movable, wandering thing, and must of necessity continue common by the law of nature, so that I can only have a temporary usufructuary property therein. (2 Bl. Com., 18.)

Flowing water is *publici juris*, not in the sense that it is *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only: That all may reasonably use it who have a right of access to it; that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. But each proprietor of the adjacent land has the right to the *usufruct* of the stream which flows through it. (*Embrey v. Owen*, 6 Exch., 353, 369.)

The property in the water itself was not in the proprietor of the land through which it passes, but only the use of it, as it passes along, for the enjoyment of his property, and as incidental to it. (*Wood v. Waud*, 3 Exch., 775.) All that a riparian proprietor is entitled to is *flumen aquæ*; but no atom of the water belongs exclusively to him. (*Earl, C. J.*, in *Medway Co. v. Romney*, 9 C. B. n. s., 586.)

In the American cases the same doctrine is just as firmly laid down. Mr. Justice Story says in *Tyler v. Wilkinson* (4 Mason (U. S.) 397):

But strictly speaking, he has no property in the water itself, but a simple use of it as it passes along.

And Kent (3 Com. Marg., 439):

He has no property in the water itself but a simple usufruct as it passes along.

In *Pixley v. Clark* (35 N. Y. 520, 91 Am. Dec. 71, [1866]), it is said:

Another maxim, flowing from the one above stated (*aqua currit*), is that the owner of the bed of the stream does not own the water, but he only has a mere right to its use; he has a mere usufruct.

^a It was held, however, in *In re State Res.* (16 Abb. N. C., 159; 37 Hun., 537) that the use of water of the Niagara River for power did not belong to the riparian owner, but was owned by the State by virtue of its title to the bed of the river.

Nature of the Right Essentially Relative.

The right pertains merely to the use of the water, but it is not an absolute and exclusive right of use, because no right which is shared equally by an indefinite number of persons can be an absolute one. All riparian owners have the same corresponding right. The enjoyment of the right, therefore, is necessarily relative and is restricted and interfered with by the like enjoyment of the same right in other riparian owners.

The following quotation from the opinion of Cole, C. J., in *Fox River Flour and Paper Co. v. Kelley* (70 Wis., 287, 293), states the relative nature of riparian rights:

This case involves questions relating to riparian rights, and it may be well, at the outset, to refer to some elementary doctrine which defines or states what these rights are. In *Head v. Amoskeag Mfg. Co.* (113 U. S., 9-23), Mr. Justice Gray says: "The right to the use of running water is *publici juris* and common to all the proprietors of the bed and banks of the stream from its source to its outlet. Each has a right to the reasonable use of the water as it flows past his land, not interfering with a like reasonable use by those above or below him. One reasonable use of the water is the use of the power inherent in the fall of the stream and the force of the current to drive mills. That power can not be used without damming up the water and thereby causing it to flow back." In *Bates v. Weymouth Iron Co.* (8 Cush., 548-552), Chief Justice Shaw says: "The relative rights of landowners and mill owners are founded on the established rule of the common law that every proprietor through whose territory a current of water flows in its course toward the sea has an equal right to the use of it for all reasonable and beneficial purposes, including the power of such stream for driving mills, subject to a like reasonable and beneficial use by the proprietors above him and below him on the same stream. Consequently no one can deprive another of his equal right and beneficial use by corrupting the stream, by wholly diverting it, or stopping it from the proprietor below him, or raise it artificially so as to cause it to flow back on the land of the proprietor above." Chancellor Kent says: "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution or alteration. No proprietor has a right to the use of the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat* is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he can not unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors he can not divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant or an uninterrupted enjoyment of twenty years, which is evidence of it." (3 Kent's Comm., star page 439.) The authorities might be multiplied indefinitely which define the right in substantially the same language, but it is unnecessary. In *Lawson v. Mowry* (52 Wis., 219), the same doctrine is recognized and applied and many cases cited which enforce it.

The use of the water may be for ordinary and extraordinary purposes.

Every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for domestic purposes * * * and this without regard to the effect which such use may have in case of a deficiency upon proprietors lower down the stream. (*Miner v. Gilmour*, 12 Moore P. C., 131, 156.)

But further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors either above or below him. Subject to this condition, he may dam up a stream for purposes of a mill or divert the water for the purposes of irrigation. But he has no right to intercept the regular flow of the stream if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury. (*Buttall v. Bracewell*, L. R., 2 Exch., 1.)

Riparian proprietors upon both navigable and unnavigable streams are entitled, in the absence of grant, license, or prescription limiting their rights, to have the stream which washes their lands flow as it is wont by nature, without material diminution or alteration. Each proprietor may, therefore, insist that the stream shall flow to his land in the usual quantity, at its natural place and height, and that it shall flow off his land to his neighbor below in its accustomed place and at its usual level. The proprietors have no property in the flowing water which is indivisible and not the subject of riparian ownership, but may use it for any purpose to which it can be applied beneficially without material injury to others' rights, or for which the fall of the stream may make it available as a motive power. * * *

Each riparian proprietor has a right to the *ordinary* use of the water flowing past his land, for the purpose of supplying his natural wants, including the use of the water for the domestic purposes of his home or farm, such as drinking, washing, or cooking, and for his stock. For these natural uses, by the weight of authority, he may, if necessary, consume all the water of the stream. This right is his only, and is strictly confined to riparian land. He has also the right to use it for any other purpose, as for irrigation or manufactures; but this right to the *extraordinary* use of the water is inferior to the right to its ordinary use; and if the water of the stream is barely sufficient to answer the natural wants of the different proprietors, none of them can use the water for such extraordinary purposes as irrigation or manufactures. * * *

The right to such extraordinary use of flowing water is common to all riparian proprietors. It is not an absolute and exclusive right to all the water flowing past their lands, but it is a right to the flow and enjoyment of the stream, subject to a similar right in all the proprietors, their privileges being in all respects equal. If the reasonable use by one man of this common property does no actual and perceptible damage to the right of the other proprietors to use it, no action lies; but an unreasonable use of it, whereby others are deprived in whole or in part of the common benefit, is an actionable injury, even though there is no present actual damage, and without regard to the question whether the act which causes the injury is willful or malicious, or whether notice was given that the rights of others are infringed. (Gould on Waters, 3d ed., secs. 204-206.)

Scope of Riparian Rights.

The scope of the riparian rights is necessarily indefinite, depending upon the volume of the stream, the topography of the country, the extent of riparian ownership, whether the stream is navigable or non-navigable, the public or private character of the water. In general, as between riparian owners, unaffected by the public right of use, it includes the right of access to the water, and this on navigable streams would permit of building wharves, piers, or other structures into the water to reach the navigable portion of the stream. It also includes the right of flow; to have the stream continue to flow as it is wont, with respect to volume, rate, and evenness. Continuance of the stream in its customary place or channel is also a riparian right essential to the existence of the right itself. Likewise the scope includes the right to have the water remain in a reasonably pure condition. The right to alluvion, reliction, and avulsion, and the right to the products of the water, such as ice and fish, are usually included within the scope.

It is not the purpose here to discuss in detail the foregoing rights. They are enumerated merely to lead up to the particular riparian right which it is the object of this brief to consider, viz, the right of the riparian to use the fall of the water to develop power.

Right to the Benefit and Advantage of the Fall of the Stream—the Water Power.

It is the purpose under this head to state the nature of the riparian right to use the water for power, as between riparian owners, unaffected by the existence and exercise of the public right of use. All statements and quotations are made for this purpose only, and are

applicable solely to those waters in which the public has no rights. All riparian rights are qualified and restricted because of the indefinite number of persons who are entitled to share equally in such rights. Some rights are more qualified and restricted than others. The right to use the water for power is especially subject to qualifications and restrictions by reason of the natural tendency which such use has to encroach upon the equal rights of others. The relative nature of this right of use can be shown by the following quotations, which state what is elementary and entirely settled in the law governing waters.

The water power to which a riparian owner is entitled consists of the fall in the stream when in its *natural* state, as it passes through his land, or along the boundary of it; or, in other words, it consists of the difference of level between the surface where the stream first touches his land and the surface where it leaves it. (Gibson, C. J., in *M'Calmont v. Whitaker*, 3 Rawle, 84.)

Every riparian proprietor, on either bank, is fully entitled to the benefit of the water, as it subsists in its *natural* state. It follows, then, that no single proprietor, without consent, has a right to make use of the flow, in such a manner as will be to the prejudice of any other; and that he has no more power to apply it to a purpose which occasions a return of the water on the land *above*, than he has to cause a diminution of the quantity *below*. He can not alter the level of the water, either where it *enters*, or where it *leaves*, his property. (Angell, *Water Courses*, sec. 340.)

A riparian owner can not be said to be entitled to a natural mill seat for the propulsion of machinery by falling water, although such a mill seat may exist, if it appears that the title to the land between the point where the mill is to be located and a point a sufficient distance up the stream to give a headrace with a sufficient fall of water to render it valuable for milling purposes is not in such owner. (Farnham, *Waters*, sec. 471.)

The water to which every riparian proprietor is entitled consists of the difference of level between the surface where the stream in its *natural* state first touches his land and the surface where the stream leaves his land. He has no right to dam the water back so as to throw it upon the land above his own. If he does so by a single foot or less, he is liable to an action, even though the proprietor above him suffers no material injury and though the mill of the trespasser is a public benefit. (*Dickson v. Burnham*, 14 Grant's Chan. (U. C.), 595.)

The rule is elementary that unless affected by license, grant, prescription, or public right, or the like, every proprietor of land on the bank of a stream of water, whether navigable or not, has the right to the use of the water as it is wont to run, without material alteration or diminution, and no riparian owner has the right to use the water of the stream to the prejudice of other riparian owners above or below him by throwing it back upon the former or subtracting it from the latter. (Lyon, J., in *Kimberly & Clark Co., v. Hewitt*, 79 Wis., 334.)

Every proprietor of land through which a water course runs has a right to the use of the impelling force of the current, or what is more familiarly called the head and fall of the current, for mill purposes, *so far as they exist on his own land, if there be any such head and fall within his own limits*. If the water flows at nearly a level, there will be no such available head and fall. If the descent be very rapid, there will be such head and fall, and of course mill sites or privileges at short distances from each other. If the descent be gentle and regular and the land of the proprietor not extensive, the head and fall on his own land may be quite insufficient for practical use for mill purposes. (Shaw, C. J., in *Gould v. Boston Duck Co.*, 13 Gray, 442, 450.)

As between riparian owners, unaffected by the public rights, whether a water power exists as a riparian right depends therefore in the first place upon whether there is sufficient fall in the stream in its *natural* condition within the limits of a single riparian owner. If there is no such fall, then the use of the water for power is not a riparian right.

The creation of a water power, however, usually involves something more than the possession of a sufficient fall within the limits of a single riparian proprietor. The maxim is that each riparian is entitled to have the water *flow* as it is accustomed to flow in its

natural state. The use of the water for power necessarily involves an interference with the *flow* of the stream and is *prima facie* a violation of the maxim. But this right to have the flow uninterrupted is subject to a reasonable interference. As between riparian owners, unaffected by the public rights, each riparian has a right to check the flow long enough to accumulate a head of water sufficient to run his machinery. This interruption must be reasonable and enjoyed in relation to a similar right in the adjoining riparian owners. Every unreasonable interference with the flow is an invasion of the property right of adjoining riparian owners and subjects the author of such interference to an action for damages.

The right of interruption extends to *impounding* the water for a reasonable time. But such impounding must be done with due regard to the rights of other riparian owners and subordinate to the public rights. For example, if the storage pond is emptied at a time when there is no unusual quantity of water flowing in the stream, the lower owner can not be deprived of the use of the water while it is being refilled. (*Weare v. Chase*, 93 Me., 264.) The upper owner can not detain the water in his reservoir during the autumn and spring, when his mill is supplied from another source, for the purpose of providing a supply for the summer months, when there is a scarcity of water. (*Clinton v. Myers*, 46 N. Y., 511.) If the water can not be held back without unreasonable injury to the lower owner, the upper owner has no right to do so, although unless he does so he can not run his mill. (*Miner v. Gilmour*, 12 Moore P. C. R., 131.) Likewise, the manipulation of the flow, by retarding or accelerating it, can only be done so as not to interfere unreasonably with the rights of the adjoining owners.

A water power, therefore, so far as it pertains to a riparian owner's land, is a potentiality—a possibility. A riparian has no right to a water power as such. He has a right to the natural and customary flow of the stream and to make a reasonable interference with the flow. If the stream in its natural condition with a reasonable interference with its flow will produce a practical amount of power, then such beneficial use as against other riparian proprietors and third persons, but not as against the State, belongs to the riparian. If, however, in order to get sufficient power he is obliged to change in the least degree the natural level of the water or interfere unreasonably with or manipulate its flow, he has no water power, for this would involve an invasion of the reciprocal rights of the adjoining riparian owners, and “no man can be said to have a mill privilege which can not be used without injury to others.” (*Davis v. Fuller*, 12 Vt., 178.)

The Mills Acts: Their Necessity and Purpose.

A water power as the result of the exercise of riparian rights, therefore, must result from the stream at its natural level and without unreasonable interference with its flow. In very many situations there will not be found within the limits of the land of a single riparian owner a sufficient fall in the stream in its natural condition to produce a practical amount of power, or such power can not be made available without an unreasonable interference with the flow of the stream. A change in the natural level of the stream or an unreasonable inter-

ference with its flow is an encroachment upon the rights of other riparian owners, and constitutes a tort subjecting the party guilty to liability for damages. The development of effective water power within the limits of an ordinary riparian proprietor is, in most cases, impracticable; an encroachment upon the rights of others is usually necessary. Authority to invade the riparian rights and the lands of others can only be obtained by grant from such others or by adverse use for a sufficient length of time to acquire such right by prescription. If the other riparian owners refuses to consent or there has been no prescriptive right obtained, the development of a water power within the limits of one's own land is, in most cases, impracticable without the aid of the State. Because of the practical difficulty of developing water power within the limits of a single riparian owner, and because of the practical difficulty of obtaining the necessary consent of other riparian owners, there were enacted in Massachusetts in a very early day what are known as the "Mill Acts." The purpose of these acts was to permit a riparian owner, by making artificial changes in the level of the stream, to back the water upon the upper riparian owner and flood his land, paying damages for the injury thereby inflicted. Statutes similar to the Massachusetts law have been passed in Wisconsin and many other States.

In Wisconsin the act is limited to nonnavigable streams.^a The effect of such legislation has been to enable a single riparian owner to develop a practical amount of power. While there is conflict of opinion as to the ground on which this legislation can be constitutionally justified, whether as an exercise of the right of eminent domain or of police power, and what is the nature of the public purpose which is served, the result of such acts is clear, viz, that a riparian owner who has not within the limits of his own land an adequate water power may, by proceeding under the statute, acquire such a power by changing the natural level of the stream in such a way as to interfere with the property rights of the upper riparian owner.^b Such a change results in the flooding of the upper land and is practically a taking of it. The constitutionality of such legislation has been violently attacked on the ground that it is a taking of private property for private purposes. While in some jurisdictions such acts have been held unconstitutional in many other States, including Wisconsin, they have been upheld. As only the State can take private property for public purposes, and as such a power is a prerogative of sovereignty only, the grant of such power to an individual constitutes a *franchise*; for a franchise is a sovereign prerogative in the hands of a citizen. A water power, therefore, which is made possible only by reason of the authority conferred by the State does not result from the exercise of riparian rights as such, but from the rights under the state grant.

^a The State aid given in the Mill Act has, however, been extended to riparian owners on navigable streams by special acts either expressly conferring the rights under the Mill Act upon the grantee, or by granting rights substantially the same as those given under such act.

^b For the present purpose it is not necessary to discuss the theory of the Mill acts nor the extent to which a riparian owner availing himself of such legislation obtains rights in the land of others. In Wisconsin such legislation is upheld by virtue of the power of eminent domain conferred upon individuals to promote public purposes. (Newcomb v. Smith, 1 Chand., 71; Pratt v. Brown, 3 Wis., 603; French v. Owen, 5 Wis., 112.)

Conclusion with Respect to the Relative Rights of Riparian Owners to Use Water for Power.

From the foregoing exposition of the relative nature of a riparian right to use water for power, the following conclusion is drawn:

As between riparian proprietors, unaffected by the rights of the public, before a water power can properly be included as a riparian right two things must appear: (1) That the difference in the natural level of the water from the point where it enters the riparian owner's land to the point where it leaves will produce sufficient momentum or fall to turn machinery; (2) that such momentum or fall can be rendered available without an unreasonable obstruction, detention, acceleration, or manipulation of the flow of the stream.^a If these factors are present, then a water power is the result of the exercise of a riparian right. If these factors are not present, then a water power is not a *riparian* right, for no man can be said to have a water power which can be produced only by encroaching upon the rights of others. A water power which can be produced only by an artificial change in the natural level of the stream or by an unreasonable obstruction, detention, acceleration, or manipulation of the flow is not *riparian* property, but originates either in voluntary grant from other riparian owners or in an authority from the State to appropriate the property of other riparian owners, in which latter situation the water power results by virtue of the state grant and not by virtue of the riparian proprietorship.

Enjoyment of the Riparian Right in Relation to the Rights of the Public.

From the foregoing it will be seen that riparian rights generally, and the right to use the water for power in particular, is relative and restricted by reason of the existence of corresponding rights in other riparian owners, so much so that the effective development of power is possible only by legislative aid. It is now proposed to show that on navigable streams the riparian right is further restricted and limited by reason of certain rights in the public to use the water. It is well settled that in streams of sufficient size to be navigable the public has *some* rights. The existence of these rights necessarily produces some restriction upon the exercise of riparian rights. The extent of this restriction will depend upon the nature and scope of the public right. There is lack of agreement in the cases as to the nature and extent of this restriction because of a lack of agreement in the nature and extent of the public right. Without attempting at this point to ascertain exhaustively the scope of the public right, all concede that the public right of use includes at least the right to navigate, and in Wisconsin "navigation" has received a very broad meaning. Notwithstanding this conceded right, there is a diversity of opinion as to the extent of the restriction upon riparian rights which is produced by the existence of this public right.

^a Possibly a third requirement should be added. That on nonnavigable streams the domestic uses to which the upper riparian owners may put the water does not require a reduction of its volume below the point of efficiency.

Restrictions upon the Riparian Rights Because of the Public Right of Navigation.

The following cases will show that certain conceded riparian rights have been either greatly restricted or totally destroyed by the exercise of the public right of use.

Access is a valuable riparian right. This was expressly recognized in *Delaplaine v. C. & N. W. R. Co.* (42 Wis., 214). Access is the riparian owner's right to get to and from the water flowing past his land, and it includes the right to build wharves or piers to get to the navigable portion of the stream. In improving and promoting the public use of the stream for navigation, however, this right has been either greatly restricted or denied altogether. It is limited or denied in New Jersey, New York, Iowa, Washington, Mississippi, Massachusetts, Louisiana, Oregon. In the federal courts and in Wisconsin it has been absolutely denied.

(*Cohn v. Wausau Boom Co.*, 47 Wis., 314, 1879.)

Plaintiff was the owner of timber land having a large frontage on the Wisconsin River, which he purchased with a view of erecting a sawmill. The shore in front was especially adapted for this purpose, and could be used without interference with navigation. The chief value of the land was due to its accessibility to the river, which afforded natural and necessary appurtenances for a sawmill and lumber manufactory. Defendant was authorized by the legislature to improve the navigation of the river, and was granted the exclusive right to construct booms, etc., for a certain distance along the river, including the space in front of plaintiff's land. By its charter it was required to extend to all persons the equal right to use its facilities. Pursuant to its authority defendant constructed, along the entire length between the low-water mark and the thread of the stream, a line of piers, booms, and piles, and completely appropriated and blocked up the entire bed of the river in front of plaintiff's land and rendered it impassable and unnavigable, except in a channel immediately in front of the plaintiff's premises through which the water was made to flow with increased velocity. The approach to plaintiff's land was rendered inaccessible for logs and lumber, all connection with the center of the stream cut off, and the fitness of the land for booming and milling purposes destroyed. Plaintiff's bill to have the defendant's works abated as a nuisance and for damages was dismissed, the court (Ryan, C. J.) saying:

It is settled in this State that a riparian owner on navigable water may construct in front of his land in shoal water proper wharves, piers, and booms, in aid of navigation, at his peril of obstructing it, far enough to reach actually navigable water. This is properly a riparian right, resting on title to the bank, and not upon title to the soil under water. It is a private right, however, resting, in the absence of prohibition, upon a passive or implied license by the public; is subordinate to the public use, and may be regulated or prohibited by law. (*Diedrich v. Ry. Co.*, 42 Wis., 248; *Stevens Point Boom Co. v. Reilly*, 44 Wis., 295; s. c. 46 Wis., 237.)

In answer to the contention that the State authorized the defendant to construct its work so as to take the plaintiff's property without compensation, it was said (324):

The appellant must therefore be held to be a *quasi* public corporation (*Atty. Gen. v. Railroad Cos.*, 35 Wis., 425), an agent of the State for the improvement of the river (*Wis. R. I. Co. v. Manson*, *supra*), and its franchises granted for a public use.

Of course, private property of others could not be in any way appropriated or used by the appellant in aid of the public purpose, without authority of law, upon just

compensation. But the land of the respondent is neither taken nor used; the works of the appellant neither touch it nor overflow it. The statutes under which the appellant acts authorize no such interference with the property of others. They only aid the public use for which the appellant is chartered by restraining the exercise of a private right which the legislature appears to have considered inconsistent with it; a right which the respondent, as other riparian owners, held only by implied public license—as it were, as tenant by sufferance of the State; a right of which the exercise might always be prohibited by public law in aid of public use. The private right is a *quasi* intrusion upon the public right, tolerated only in private aid of navigation, and gives way, *ex necessitate rei*, to public measures in aid of navigation.

This private right of the riparian owner is subordinate to the public use of a navigable river and is always exercised at peril of obstructing navigation. This subjection of the private right to the public use may sometimes impair the private right or defeat it altogether. But the public right must always prevail over the private exercise of the private right. (*S. P. Boom Co. v. Reilly*, 46 Wis., 237.) As against the riparian owners, within the limits specified in the statute, the State has only resumed its own. Otherwise, the title, possession, and use of the respondent's land remain intact. If the public action lessen its value, it is literally *damnum absque injuria*. (*Alexander v. Milwaukee*, 16 Wis., 247.)

Black Falls Imp. Co. v. La Crosse, etc., Co. (54 Wis., 659 [1882]).

Plaintiff, acting under legislative authority, granted in 1864, to improve the navigation of Black River, closed by a dam the entrance of Black Snake River, a navigable stream which diverged from the main channel of Black River and rejoined it at a point lower down. Defendant was organized by special act, in 1872, for the purpose of manufacturing lumber into various forms, and also to improve the navigation of Black River within specified limits. Defendant was also a riparian owner on Black Snake River and maintained in front of its banks booms, piers, and rafting works. In order to restore the navigable character of Black Snake River, defendant tore down the dam at the entrance. Plaintiff's bill seeking to enjoin the defendant from further interfering with its dam was sustained. The court said (p. 681):

The waters in a navigable river, or other navigable body of water, are so far the property of the State that the State may control them for public purposes, in their flow or otherwise, without making any compensation to the riparian owners upon the borders of such streams or bodies of water. The flowing waters in such streams are public highways, and such waterways are as much subject to the control of the State for the purposes of the improvement of such ways as a highway upon the land. The right of the public to raise or lower the grading of a public street without being required to compensate the adjacent owners is well established by the decisions of this court (*Dore v. City of Milwaukee*, 42 Wis., 108; *Harrison v. Bd. of Suprs. of Milwaukee Co.*, 51 Wis., 645); and the right to discontinue a highway without making compensation has always been recognized by the law. The right of the riparian owner to have the water of a navigable stream flow past his lands adjoining the same as they were accustomed to flow, is as perfect against everybody except the State, or some person or corporation standing in its stead, as it is in the case of unnavigable streams; and that right does not, as this court has decided, depend upon his ownership of the soil under the water, but upon his riparian ownership (*Cohn v. Wausau Boom Co.*, 47 Wis., 314, 322); and the right of the State to control the waters of such streams in the public interest is the same whether the ownership of the soil under the water be in the State or in the riparian owner.

The doctrine of the cases above cited has, as we think, been fully adopted by this court in all cases where the interference with the waters of a navigable stream has been for the improvement of the navigation thereof. Whether this court has decided or will decide that the State may, for any and all public purposes, interfere with the waters of a navigable stream, whereby injury may result to the riparian owner, without making compensation therefor, need not be determined in this case. The plaintiff represents the State for the purpose of improving the navigation of the Black River, and that which it has done under its charter, which is complained of by the defendants, we think must be, for the purposes of this action, considered to have been done for the improvement of navigation in said river. And, as against the State, or the plaintiff acting in its stead, we think this court has determined that

the riparian owners on the banks of the Black River, or the Black Snake River, have not the absolute right to have the waters of said river flow as they were accustomed to flow in front of or through their lands.

This last case goes to even greater extent than interfering merely with a right of access. One riparian right is said to be the right to have the stream remain in its usual channel. In this case the court sustains the right of the plaintiff, acting as agent of the State, to improve the navigation of the river, to take away the stream altogether, thus adopting a similar doctrine from New York with respect to the Mohawk and other rivers and the doctrine of Pennsylvania with respect to all its rivers. The court bases its decision upon *Rundle et al. v. Delaware, etc., Canal Co.* (14 How., 80); *McKeen v. Delaware, etc., Canal Co.* (49 Penn. St., 424); *People ex rel Loomis v. Canal Appraisers* (33 N. Y., 461). In all these cases the State drew off the water from navigable rivers to supply certain canals being constructed as part of a general scheme to improve navigation. In the second Pennsylvania case the court said:

Everyone who buys property upon a navigable stream purchases subject to the superior rights of the Commonwealth to regulate and improve it for the benefit of all her citizens. If, therefore, he chooses to place his mills or his works, for the *qualified* use he may make of the water, within the limits or influence of high water, he does so at his own risk, and can not complain when the Commonwealth, for the purpose of improvement, chooses to maintain the waters of the stream at a given height within its channel.

The New York case deals with the Mohawk River, which being navigable in *fact* though not in *law*, is held in the case mentioned to be a public river, and therefore the waters may be diverted by the State to supply its canals without compensation. In later cases, especially *Smith v. Rochester* (92 N. Y., 463), the court limits the Loomis case to the Mohawk River on the ground that that river was governed by the civil and not by the common law. But there is no doctrine of the civil law by which the State could divert all the water. The real ground on which the Loomis case goes is this: The court abandoned the English test of what constitutes a public river, viz, navigable in law (which means affected by the ebb and flow of the tide) and adopted a new test, navigable in fact. The Mohawk being navigable in fact was a public river, and its waters could be used for the purpose of navigation to the exclusion of riparian owners. The later cases abandoned this test and returned to the English test of navigable in law (i. e., tidal). All streams in New York except the Mohawk and perhaps the Hudson above the flow of the tide are private streams subject only to the right of navigation. But the later cases do not purport to overrule the Loomis case. The significance of that case lies in this: First, it recognizes the distinction between public waters and private waters. Second, that the test of public water is its navigable quality. Third, that if water is public all riparian rights are held subject to impairment or destruction by the public use of such water for navigation.

Scranton v. Wheeler (179 U. S., 141, 163 [1900]).

The plaintiff was the owner of land bordering on the St. Marys River, a public navigable river in Michigan, whose access from his land to navigability was permanently lost by reason of the construction, under authority of Congress, of a pier resting on submerged

lands away from but in front of his upland, and which pier was erected by the United States not with the intent to impair the right of riparian owners but for the purpose only of improving the navigation of such river. The court held (three judges dissenting) that the plaintiff was not entitled to compensation. It was said:

Whether the title to the submerged lands of navigable waters is in the State or in the riparian owners, it was acquired subject to the rights which the public have in the navigation of such waters. The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation. * * * But the contention is that compensation must be made for the loss of the plaintiff's access from his upland to navigability incidentally resulting from the occupancy of the submerged lands, even if the construction and maintenance of a pier resting upon them be necessary or valuable in the proper improvement of navigation. We can not assent to this view. If the riparian owner can not enjoy access to navigability because of the improvement of navigation by the construction away from the shore line of works in a public navigable river or water, and if such right of access ceases alone for that reason to be of value, there is not, within the meaning of the Constitution, a *taking of private property* for public use, but only a consequential injury to a right which must be enjoyed, as was said in the *Yates* case, "in due subjection to the rights of the public"—an injury resulting incidentally from the exercise of a governmental power for the benefit of the general public and from which no duty arises to make or secure compensation to the riparian owner. The riparian owner acquired the right of access to navigability subject to the contingency that such right might become valueless in consequence of the erection under competent authority of structures on the submerged lands in front of his property for the purpose of improving navigation.

The court expressly distinguishes *Railroad Company v. Schurmeir* (7 Wall., 272) and *Yates v. Milwaukee* (10 Wall., 497) cases, on which great reliance has been placed as supporting the proposition that the riparian right of access can not be destroyed without compensation.

In accord with *Scranton v. Wheeler* are the following: *Gibson v. United States* (166 U. S., 269); *Salliotte v. King Bridge Company* (122 Fed., 378); *Sage v. New York* (154 N. Y., 61).

The restriction produced by the existence of the public right may also be seen in connection with the riparian right to take fish. In nontidal but navigable streams, and therefore *private* streams, in England the public right of use for fishing does not exist. Fishery is real property. From the earliest times fisheries were recognized as a part of the estate. (*Tudor v. Cambridge Waterworks*, 1 Allen, 164; *Queen v. Robertson*, 6 Can. S. C., 52; Angell, secs. 61-68; *Farnham*, secs. 368b, 368c; *Royal Fishery of the Banne*, Davies, 149.)

In *Willow River Club v. Wade* (100 Wis., 86) the court held that the riparian right of fishing was subordinate to the public use of the stream, whether for the public right of navigation and as incident thereto or independent thereof, may not be entirely clear from the majority opinion. The case will be examined more in detail later.

The restriction may also be seen in connection with the riparian right to use the stream for power. In Wisconsin the use of the stream for power is subordinate to its improvement and use for navigation.

Falls Mfg. Co. v. Oconto, etc., Co. (87 Wis., 134 [1894]).

This was an action to restrain the defendant from interfering with or interrupting the natural flow of the Oconto River at plaintiff's sawmill so as to impair the usefulness of its water power, and for damages. The plaintiff's dam was built first under legislative authority. Likewise the defendant was afterwards authorized by law to improve the navigation of the river and to build flooding dams. By reason of a dam 14 miles above plaintiff's dam the water was held back and let out periodically, so as to greatly impair the plaintiff's water power. The plaintiff's bill was dismissed, the court holding that, Oconto River being a navigable stream and a public highway, the legislature could legally authorize the improvement thereof by the construction of flooding dams in such stream in aid of navigation. This case was decided in 1894, three years after the decision in the case of Green Bay and Mississippi Canal Co. v. Kaukauna Water Power Co. (142 U. S., 254). The court relies upon Cohn v. Wausau Boom Co., *supra*; Black Falls Imp. Co. v. La Crosse, etc., Co., *supra*; Rundle v. Delaware, etc., Canal Co., *supra*.

From the foregoing it is apparent that, granting for the present that the public use of navigable streams extends no further than using them for navigation and fishing, the existence of such use is a serious restriction and in some instances a total deprivation of riparian rights, and especially on the riparian right to use the stream to develop power.

Dams or Obstructions in Navigable Streams are Nuisances.

By reason of the existence of this public right of use of navigable rivers for navigation any obstruction placed in or over such rivers is a nuisance, and is subject to be abated after the manner of all public nuisances.

Barnes v. Racine (4 Wis., 454), Hale v. Carpenter (68 Wis., 165), In re Eldred (46 Wis., 530), Wisconsin River Imp. Co. v. Lyons (30 Wis., 61), Charnley v. Shawano, etc., Imp. Co. (109 Wis., 563), Conn. Co. v. Little Suamico, etc., Co. (74 Wis., 652).

According to well-established decisions of common law, irrespective of any statutory provisions, such obstructions would constitute nuisances. The legislature, however, in 1853 enacted what is now known as section 1596 of the Statutes of 1898. That statute has remained substantially unaltered from that day to this. The material part is as follows:

All rivers and streams which have been meandered and returned as navigable by the surveyors employed by the Government of the United States are hereby declared navigable so far as the same have been meandered to the extent that no dam, bridge, or other obstruction shall be made in or over the same without the permission of the legislature.

It will be noticed that the section is limited to *meandered* navigable rivers. It is well settled that there are nonmeandered rivers which are nevertheless navigable to which the statute does not apply, but obstructions in or over which would constitute public nuisances. The legislature could, if desired, extend the statute to cover all navigable streams, irrespective of whether they were meandered. The purpose of section 1596 was to declare that as to one class of navigable rivers, viz, *meandered* navigable rivers, no obstruction should be placed in

or over them without legislative permission. It was contended in 1872 that if an obstruction did not actually interfere with the free use of the stream for navigation, it could be maintained without legislative permission. This question arose and was disposed of in *Wisconsin River Improvement Co. v. Lyon* (30 Wis., 61 [1872]).

Action by plaintiff company to enjoin defendant from erecting a dam in the Wisconsin River at a point where plaintiff was improving the navigation. Plaintiff claimed that the dam defendant proposes to erect will seriously impair the navigation. Defendant claimed that the dam will improve navigation. Defendant showed no legislative authority. Held:

This right on the part of the public to regulate and control such navigable streams in the interest of commerce and navigation includes the right on the part of the legislature to prohibit by statute the erection of any dam, bridge, or other structure, within or over the same, which may operate to impair or obstruct the free navigation thereof unless the permission of the legislature be expressly obtained for that purpose.

The plaintiff obtained an injunction.

The circuit court found as a *fact* that if the dam had been completed according to the intention and plan of defendant, the same would not have been an obstruction to navigation.

As a conclusion of law, the court found and decided that the dam, not thus constituting an obstruction, might be lawfully erected and maintained.

After referring to section 1596, Wisconsin Statutes, the court (Dixon, C. J.) says:

How, in view of this positive statutory prohibition, it can be maintained that the defendant may lawfully erect the dam in question, even though when erected it should prove no obstruction or detriment to navigation, is certainly more than this court is able to perceive. The words of the statute are that no dam should be made without the permission of the legislature, and it is impossible to evade these words, or to avoid the effect of the prohibition by speculating upon the possibility that the dam, when erected, may not impede or obstruct the navigation, which after all is but mere speculation. As stated by some of the witnesses, no man can predict or anticipate with any certainty what the effect of the dam when completed may be upon the navigation, and it is enough for the courts to know, and absolute law unto them, that the legislature, acting within the scope of its powers, has said that the party is a trespasser upon the rights of the public and shall not erect his dam without public permission, even though the same may prove, as he claims, to be a benefit instead of an injury to the navigation. We know of no way of getting along with the positive provisions of such a law, except that of being governed by and giving full effect to its requirements.

The significance of the case lies in this: If the public right of use extends only to navigation, then the defendant's contention should have been sustained, because the trial court found as a fact that defendant's dam would not obstruct navigation, and therefore he should have been permitted to maintain it. In deciding that the dam could not be maintained, irrespective of whether or not it interfered with navigation, the court in effect decided that the public right of use extended beyond the use of the stream for navigation.

Section 1596 above referred to has been the law of the State for almost sixty years. The interpretation placed upon it in *Wisconsin River Improvement Co. v. Lyon* (*supra*) has stood for almost forty years. Riparian owners during all this time have been coming to the legislature for permission to place obstructions in navigable streams. Permission has been given, not to place obstructions in the stream in the form of dams for the purpose of developing water power, but to improve the stream for purposes of navigation. Until the present

controversy about water powers, the constitutionality of this section appears never to have been questioned. It is now asserted that the State can not refuse its permission to erect a dam, if such structure will not in fact interfere with navigation; that, as the public right of use extends only to navigation, the owner may construct a dam not interfering with navigation, without legislative permission; if the legislative permission is necessary, it can not be withheld if in fact the proposed structure will not interfere with the free use of the stream for navigation. Substantially the same contention was made in *Wisconsin River Imp. Co. v. Lyon* (*supra*) and decided adversely to the riparian owners. It is true that in this case the attention of the court was not directed to the constitutionality of section 1596, and, therefore, limiting the case to precisely what was in the mind of the court, it may be said that the decision does not conclusively establish the constitutionality of the section. The effect of the decision, however, is clear: It establishes the right of the State to forbid any obstruction in the navigable river, irrespective of its effect on navigation. It has been claimed, however, that the defendant's dam did in fact interfere with navigation, because the trial court found that the plaintiff had suffered \$600 damages. This finding of special damages to the plaintiff, however, was essential to the maintenance of the action. From anything that appears to the contrary, the plaintiff was suing in its private capacity to abate a nuisance, because of special and peculiar damage to it, and therefore the finding of some special damages was necessary, for the private party could not maintain a bill to abate a nuisance unless he could show special and peculiar damages. Such a finding does not necessarily establish that the dam was in fact an obstruction to the public right, the trial court finding that the dam did not in fact obstruct navigation.

In connection with the contention that the riparian owner may erect without legislative permission a dam which does not obstruct navigation, two cases must be noticed.

Conn Co. v. Little Suamico Lumber Mfg. Co. (74 Wis., 652 [1889]).

Action for damages for obstructing plaintiff's logs so that they could not be floated down. Defendant had built a dam in a small nonmeandered river, but navigable in fact. Held:

That the jury must have found that the alleged obstructions did not materially impair the beneficial use of the stream for floating logs, and that the plaintiff had sustained no injury by them.

The rights of the public are not involved; the remarks of the court to the effect that the public had no cause of complaint are dicta. Plaintiff sues for a nuisance to *him*. Whether a public nuisance existed was not before the court. Plaintiff fails because he shows no injury. It does not follow that if he had shown an injury, he could not recover. The inference is that he could, even though the stream is nonmeandered. Defendant's obstructions are not per se illegal, although placed there without legislative sanction, because it is a nonmeandered stream. They are illegal depending upon the fact of material interference with the use of the stream. Obstructions in meandered navigable streams only were made illegal by the statute. (See *Wis. River Imp. Co. v. Lyon*, *supra*.) As to non-meandered navigable streams, however, the legality or illegality

depends upon the effect of the obstruction upon the free use of the stream.

The existence of the public right does not per se destroy the private right. Until the public right is asserted, the private right exists. This especially true on small nonmeandered streams.

It may very well be that in small nonmeandered streams, navigable only in the sense of being floatable, the private use may be enjoyed until actual conflict with the public use. By limiting section 1596 to *meandered* streams the legislature appears to have indicated an intention to leave the assertion of the public right until an actual conflict with the private right.

Charnley v. Shawano Water Power, etc., Co. (109 Wis., 563, 568 [1901]).

Proceedings to obtain damages to property claimed to have been overflowed by defendant's dam—In 1889 Upham and others were authorized by the legislature to erect a dam across Wolf River. Said parties or their assigns were given power to secure flowage rights under section 1777, Revised Statutes (1878), and amendments thereto. Defendant was a corporation organized for the purpose of building said dam for hydraulic and manufacturing purposes and to improve the river and facilitate the running of logs therein, and was the assignee and owner of the rights and privileges granted to Upham and others. The dam was erected in 1892. Shawano Creek, a navigable stream, empties into Wolf River about a mile and half above defendant's dam. Some forty years or more before the date of the case a dam was built across this creek a little way above its mouth, in which a head of water from 6 to 8 feet was claimed to have been maintained continuously and adversely until 1892, at which time defendant purchased the dam from one Kast, with all flowage rights. Shawano Creek is about 4 miles long and is the only outlet of Shawano Lake.

The plaintiff is the owner of land on the banks of this lake, and filed a petition for the appointment of commissioners, under section 1777, to appraise the damages to his lands by reason of the overflow of the same by defendant's dam. The defense was: (1) That the evidence does not show that the lands described in the petition are overflowed by defendant's dam; (2) the evidence does not show that the overflow of said lands is necessary in accomplishing the purpose of its creation; (3) that the defendant has a prescriptive right to overflow said lands. On all of the above points the court found against the defendant. The only evidence in the case regarding the authority to maintain the dam in Shawano Creek was the statement of Mr. Kast that he had maintained the dam publicly, claiming a right to do so without permission from anyone. The defendant claimed that this dam had been maintained a sufficient length of time to acquire a prescriptive right to flood the plaintiff's lands. The plaintiff contended that the Kast dam was a nuisance, and a prescriptive right to maintain a nuisance could not be obtained. The court holds that while as against the public a prescriptive right to maintain a public nuisance could not be obtained, yet as against the plaintiff in his private capacity the defendant might by prescription have obtained a right to maintain the Kast dam with its consequent flooding. The

following extract from the opinion shows clearly that no public rights were involved in the case:

Generally speaking, all hindrances or obstructions to the use of a navigable stream by the public, without authority from the State, are public nuisances. (*Barnes v. Racine*, 4 Wis., 454; *State v. Carpenter*, 68 Wis., 165; *Knox v. Chaloner*, 42 Me., 150. See *In re Eldred*, 46 Wis., 530.) "There is no such thing as a prescriptive right, or any other right, to maintain a public nuisance." (*Douglass v. State*, 4 Wis., 387, and cases cited.) This proposition, however, must be understood as applying to the rights of the public and not to those of individuals, and it is the failure to appreciate this distinction that has led the counsel for petitioner into some confusion. A public nuisance can not be abated by the act or at the suit of a private party unless it is shown that he has suffered some private and special injury. (*Walker v. Shepardson*, 2 Wis., 384; *Greene v. Nunnemacher*, 36 Wis., 50; *State ex rel. Hartung v. Milwaukee*, 102 Wis., 509.) This is based upon the principle that the rights of the State are to be vindicated only by public officers, but when the nuisance becomes a private one, so as to affect individual rights, the injured party may pursue his remedy. The fact, however, that a public nuisance can not be legitimated as against the public by the mere lapse of time does not justify the conclusion argued for, that no prescriptive right can be obtained as against individuals. Important rights as against individuals may be acquired and lost by adverse enjoyment for a period of twenty years or more. As against the public the Kast dam was wrongful if it obstructed the navigation of the stream. As against the petitioner it was wrongful because it overflowed (if it did overflow) his lands and thus invaded his property interests. The private right of action arises, not from the fact that the dam was unauthorized, but because land was taken by the overflow without compensation. The right to damages would have been the same had the dam been authorized by state authority. That one may obtain a prescriptive right of flowage under proper conditions can not be disputed.

From the foregoing it is plain that if the plaintiff could show that no prescriptive right had been obtained against him, and that the dam in question did in fact flood his land, he would be entitled to damages. The case in no way touches the rights of the public.

Conclusion Drawn as to the Effect upon the Private Riparian Right because of the Existence of the Paramount Public Right of Navigation.

Conceding then, merely for the moment and for the sake of argument, that the public right of use extends only to navigation and fishing, what is the position of the riparian owner with respect to his use of the water for power? As already pointed out, the riparian right when taken in relation with the corresponding riparian rights of others makes the development of efficient water power within the limits of the riparian proprietor's own land impractical in most cases; so much so that legislative aid in the form of the Mill Act was necessary for nonnavigable streams and further aid in the form of grants to improve navigation for navigable streams. Add, then, to these restrictions growing out of the corresponding rights of other riparian owners, the restrictions growing out of the existence of the public right of use for navigation and fishing, and a water power as a result of unaided riparian ownership becomes largely a matter of conjecture and speculation. If riparian owners had in the past kept, and will in the future keep, within their strict legal rights as riparian owners, asking no aid from the State for its prerogatives, effective water power will seldom result as an incident to riparian proprietorship. The public right to navigate being paramount to the private riparian right to use the water for power, the exercise of the paramount public right may entirely prevent the use of the private right, in which event the development of any water power by the riparian owner would be impossible; for example, *The Falls Mfg. Co. v. Oconto & Co.*, *supra*, where the water power was substantially

impaired by reason of the exercise of the paramount public right of navigation.

The greater number of the dams of any consequence existing in navigable^a streams were erected to promote the public use of the water, to improve it for navigation. The water power has usually been obtained as an incident to the public work. Riparian owners, by the exercise of their riparian rights solely, have not in the past in many cases been able to turn the water to use for power purposes.

Whatever power he has been able to get from the water thus far has been usually as an incident to the improvement of the water for the public use of navigation. The power of the Green Bay and Mississippi Canal Company resulted from the improvement of the stream for navigation and as an incident to this public work. Likewise, the power of the Southern Wisconsin Power Company, recently developed at Kilbourn, is an incident (it may be a controlling incident) to the improvement of navigation. The franchise granted to that company contains all the prerogatives of the State given in the Mill Act, in the statutes relating to boom companies, and in the acts relating to railroads. Is that power the product of the exercise of riparian rights or is it the product of the exercise of rights conferred by the franchise? Did the promoters of that enterprise get from the State a mere building permit to do something on their own land? Is there any analogy between the charter of the Southern Wisconsin Power Company or the charter of any of the large power companies and a building permit given by the city to a lot owner to build a house on his own land? A dam franchise is not a permit to build something on the grantee's land. It is a permit to put something on the land of some one else. It is a grant of the state's prerogatives to promote a public purpose.

Without going further, then, than to assert for the State a right to the use of navigable water for navigation and fishing (a right established by the decisions of the court and which seems to be conceded by riparian owners) a restriction is placed upon the exercise of the riparian right which, with the restrictions growing out of the correlative rights of other riparian owners, make it, in most cases, impracticable to develop water powers without the aid of the state's prerogatives, and if such development would in the judgment of the legislature be inconsistent with the paramount public right of navigation, no water power at all could be procured.

An examination of the so-called "dam franchises," of which there are between 600 and 650, which have been granted by the legislature, will disclose that in a very large number of them the power of eminent domain was conferred upon the grantees. It is elementary that the State will not grant its prerogative of eminent domain except to promote a public purpose.^b The public purpose, in aid of which the

^a In nonnavigable streams the powers have been developed by virtue of the State's aid under the Mill Act. Before the passage of the Mill Act in 1840 and during the period of its repeal from 1850 to 1857, as well as from 1840 to 1850, and in some instances after 1857, legislative grants will be found conferring upon riparian proprietors on navigable streams the benefits of the State's prerogatives. The effect of these grants was practically to make the Mill Act in special cases applicable to navigable streams.

^b It is sometimes said that a certain work or enterprise is public because those who are carrying it on have been given the power of eminent domain. This, however, is mistaking the effect for the cause. The work or enterprise is not public because it is promoted by eminent domain. It is promoted by eminent domain because it is public.

State's power of eminent domain has been conferred upon individuals in these dam franchises, was not usually the development of hydraulic power as such, but for the improvement of the water for the public use, viz, the use for navigation. Whatever hydraulic power was procured was an incident to the public work of improving the stream for navigation. The grant of the right of eminent domain to develop water power to be used for private purposes would confer the right to take private property to promote a private use. If the past grants of eminent domain are to be sustained, it must be on one or both of two grounds: (1) The improvement of a navigable stream for navigation is a public purpose, and can therefore be aided by eminent domain; (2) the development of water power to be used in manufacturing and industrial pursuits is a public purpose, and can therefore be aided by eminent domain. The second ground is the one on which the Mill Act of Wisconsin is based.

The development of mill sites was a matter of public interest, so much so that it could be aided by eminent domain, although the power thus developed was used for private purposes. To justify such a grant, however, the legislature provided that grist mills annexed to such powers were public mills to the extent that their owners were required to grind the grain of all who applied without discrimination and for a reasonable price fixed by law. (Wis. St., 1898, secs. 1671-1674.) The constitutionality of the Mill Act was vigorously assailed on the ground that the purpose sought to be aided was private rather than public. Such legislation, however, was sustained. The Mill Act was limited to nonnavigable streams. Whether or not it would have been sustained had it applied to navigable streams also is a matter of conjecture. The development of hydraulic power on navigable streams for private manufacturing and industrial enterprises was generally regarded as not serving the public purpose, and, therefore, the dam franchises were usually to improve navigation, the development of the power being an incident to the public work. Logically, it may very well be argued that if the development of hydraulic power on a nonnavigable stream was a work of sufficient public interest to justify a grant of eminent domain, much more so would the development of hydraulic power on a navigable stream be a work of public interest.^a

The grants, however, were not made to promote such work. The riparian owner on a navigable stream who desired to get an effective water power, but who did not have within the limits of his own land the conditions for getting such power by the exercise of his riparian

^a Wisconsin River Imp. Co. v. Pier (137 Wis., 325 [1908]) and In Re Southern Wisconsin Power Co. (122 N. W., 801 [1909]) contain dicta intimating that the development of hydraulic power by a public utility company subject to the provisions of chapter 277, Laws of 1907 (public utility law) could be regarded as promoting a public purpose, and that such development could be aided by the grant of eminent domain. In the first case the Wisconsin River Improvement Company was chartered to improve the navigation of the river. By a contract with the Tomahawk Power Company it was provided that the latter company should build a certain dam which was regarded as an improvement of navigation and should have the right to sell whatever water power might be developed as an incident to such improvement. The public purpose of improving navigation was held not to be impaired by the fact that the other purpose of getting power was also promoted, especially as the company obtaining the power was properly under the public utility law, and would thus be required to serve all persons desiring power without discrimination and for a reasonable price.

rights, was obliged to ask the State for the right of eminent domain, and as his purpose was not regarded as public, the state grant was to do something that was a public work, viz., to improve navigation, and incidentally the water power was obtained. It was an incident, however, to the public work, and had no independent existence. The public purpose of improving navigation, however, would not be affected or destroyed, even though the obtaining of water power was the chief incentive to undertake the improvement of navigation. *Wisconsin River Improvement Co. v. Pier (supra)*.

If the position of those who contend that the right of the public to use the stream extends only to navigation be correct, then the State can aid, by its grant of eminent domain, the promotion of that purpose only. If the use of the water for power is a private riparian right, the State can not aid, by eminent domain, the development of such power. It must be developed like any other private property, without encroaching upon the land or riparian rights of others, something which, as has been shown, is practically impossible. If the riparian owner desires the aid of the State he must take it to promote only that use of the stream which he contends the State has a right to enjoy, i. e., navigation.

If he thus undertakes to improve the stream for that purpose and to use the State's prerogatives in aid thereof, he must perform the task and use the prerogatives according to the terms and conditions prescribed by the State. In other words, in the future, as in the past, if the riparian owner's contention is correct, the state prerogative of eminent domain can be granted only to promote navigation, because, as is contended, that is the only use to which the State can put the water. If a riparian owner needs eminent domain—and in practically all cases of effective development he does—his water power will result as an incident to the promotion of the public use of improving the stream for navigation, and not from the exercise of his riparian rights.

In the discussion up to this point, in saying that the riparian right to use water for power is relative as to the other riparian owners, it is intended to announce something more than the maxim of *sic utere tuo*, etc.; and in saying that the right of the riparian is relative as regards the public, it is intended to announce something more than the general limitations growing out of so-called police power—the legislative power to control persons and property for the general welfare. It is intended to announce that the right of a riparian owner to use water for power is specially and peculiarly limited by the reciprocal rights of other riparian owners, and is subordinate to the public use of the stream for at least the purpose of navigation.

Basis of State Control.

Without extending, therefore, the State's right to use navigable waters beyond the use for navigation, an adequate basis of control exists on two grounds: (1) By the very nature of the use of water for power and the necessities of the situation, the obtaining of effective power as a result of the exercise of purely riparian rights is in most cases practically impossible. The aid of the State in the form of a grant of eminent domain is in most cases indispensable. If eminent domain is granted, it must be for the purpose of improving navigation, and this being a public work must be done on the conditions

the State prescribes. If the riparian is able to develop effective power within the limits of his own land or within the limits of land that he may acquire by voluntary conveyance of others, then in such situation, so long as he enjoys no State prerogatives, no right of state control exists other than the control which the State has over private property in general.^a (2) Even though the riparian owner is able to develop adequate power by the exercise of his riparian rights within his own land, he must do so in subordination to the State's right to use the stream for navigation. As already pointed out, the public use of a stream for navigation is paramount to the private use by the riparian owner. The private right is—

held only by implied public license, as it were, as tenant by sufferance of the State; a right of which the exercise might always be prohibited by public law, in aid of public use. The private right is a *quasi* intrusion upon the public right, tolerated only in private aid of navigation, and gives way, *ex necessitate rei*, to public measures in aid of navigation. (*Cohn v. Wausau Boom Co.*, *supra*; *Black Falls Imp. Co. v. La Crosse, etc., Co.*, *supra*; *Falls Mfg. Co. v. Oconto, etc., Co.*, *supra*.)

In authorizing the improvement of the stream or river for navigation, the legislative determination and judgment as to what will promote such work, while not absolutely controlling or beyond revision by the court, will prevail in the absence of a clear showing that such determination is irrational or colorable. In a number of legislative grants to improve navigation, the contention has been made that the so-called "improvement" was not what it purported to be, but that it was in fact an obstruction or destruction of navigation; or that the improvement of navigation was a mere secondary consideration and the development of the power was the chief object. On appeal to the court such contentions have been denied and the legislative determination has been sustained.

It is next urged that, while the act specifies that its purpose is to improve the navigation of the Wisconsin River above the dam, such dam is, in fact, an obstruction to navigation, extending, as it does, from bank to bank, and being 15 feet in height; that its real purpose is to create hydraulic power, and that the navigation of the river can not be obstructed for any such purpose. It has been held that the legislature is at least primarily the judge of the necessity for the proposed improvement, and that when it delegates such a power, and the State does not question that the improvement made is in conformity with the power delegated, neither the necessity nor the usefulness of the improvement, nor the manner in which it is made, can be called in question by private parties. (*Wis. River Imp. Co. v. Manson*, 43 Wis., 255, 265; 28 Am. Rep., 542; *Falls Mfg. Co. v. Oconto River Imp. Co.*, 87 Wis., 134, 151; 58 N. W., 257; *Underwood Lumber Co. v. Pelican Boom Co.*, 76 Wis., 76, 85; 45 N. W., 18; *J. S. Keator Lumber Co. v. St. Croix Boom Corp.*, 72 Wis., 62, 81; 38 N. W., 529; 7 Am. St. Rep., 837; *Cohn v. Wausau Boom Co.*, 47 Wis., 314, 326; 2 N. W., 546; *Black River Imp. Co. v. La Crosse B. & T. Co.*, 54 Wis., 659, 686; 11 N. W., 443; 41 Am. Rep., 66.) It is true that none of the cases cited involved the rights of a landowner whose property it was sought to condemn in aid of the alleged improvement. But the same rule, with little, if any, variation, has been applied in a condemnation proceeding against a landowner (*C. & N. W. Ry. Co. v. Morehouse*, 112 Wis., 1, 9; 87 N. W., 849; 56 L. R. A., 240; 88 Am. St. Rep., 918), and, in an action brought by a landowner whose lands were overflowed, to abate a dam authorized by the legislature. (*Allaby v. Mauston E. S. Co.*, 135 Wis., 345, 352; 116 N. W., 4; 16 L. R. A. (N. S.) 420.) In *re Southern Wisconsin Power Co.* (122 N. W., 801).

In legal contemplation, therefore, the grants of the past to improve navigation are to be taken for what they purport to be, and can not be drawn in question by private individuals. The public nature of

^a The above statement is on the assumption that the scope of the public use of water extends no further than navigation. As will presently be pointed out, if the scope of public use extends beyond navigation a further basis of state control would exist.

the work will not be affected by the fact that water power may result as an incident to such improvement, or that such water power may be the chief incentive to undertake the improvement of navigation. The State may, therefore, in the future, as in the past, continue to improve the navigation of streams and rivers by creating corporations to perform the work and confer upon them the State's prerogatives. The time, the place, and the manner of such improvement is for the legislative discretion and judgment, which are, as indicated in *In Re Southern Wisconsin Power Co.*, *supra*, controlling, except in extreme or colorable cases. The legislature may direct its work of improving navigation in such a way as to secure water power. In the past the water power which has resulted as an incident to the improvement of navigation has been used for private manufacturing purposes. Such disposition of the power was not necessary.^a It may be retained as an integral part of the improvement and used for the public to serve any legitimate public purpose, such as municipal lighting or any other legitimate municipal or state activity.^b See especially *Attorney-General v. Eau Claire* (37 Wis., 400); *State v. Eau Claire* (40 Wis., 533).

II.

Restrictions upon the Riparian Rights because of the Public Right of use for Purposes Broader in Scope than for Mere Navigation.

As has already been stated, the enjoyment of riparian rights is subject to restrictions and limitations growing out of the existence of certain rights in the public to use navigable water. All concede that the public has some rights to use the water. The scope of such public right of use is the matter in controversy. Up to this point the endeavor has been to show that by reason of the conceded public right of navigation, the riparian rights, especially the right to use the water for power, may be seriously restricted or totally destroyed. It is now proposed to show that the public right of use has never, by judicial decision or statute, been limited to navigation merely and fishing as an incident to navigation; that the scope of this public right is broader, and, as a necessary consequence, the scope of the riparian right is correspondingly narrower. To demonstrate that the scope of the public right of use extends beyond navigation, it is necessary to consider the meaning and significance of the classification of waters into public and private, and to examine the characteristics of what is usually designated public water.

^a The case of *Green Bay and Mississippi Canal Company v. Kaukauna Water Power Co.* (142 U. S., 254; 70 Wis., 635), explained later on page —, does not deny the right of the State to take the water power for public uses without compensation.

^b In view of the dicta in *Wis. River Imp. Co. v. Pier* (*supra*), it may be argued that the development of hydraulic power alone, and not as an incident to the improvement of navigation, is a work of sufficient public interest to be aided by a grant of eminent domain, provided the company doing the work was clearly subject to the provisions of the public-utility act, and was required to serve all without discrimination and for a reasonable price. A riparian owner, having a possible water power which he was unable to develop effectively within the limits of his own land, might seek the State's aid on the ground that the development of the power directly and primarily would be a work of public interest. The power thereby produced, however, would be disposed of subject to the provisions of the public-utility act. In this situation, as in those already mentioned, the development would be under the state franchise.

The Status of Waters in Wisconsin: In General.

The supreme court of Wisconsin—

has repeatedly said that the navigable waters of the State have substantially the incidents of tidal waters at common law; that the title to the beds of such waters was reserved for the State by the ordinance of 1787 and vested in it at the instant it was admitted into the Union to preserve the public character of such waters with all such incidents; and that the State never has and never can constitutionally impair the trust. (*Rossmiller v. State*, 114 Wis., 169, 186 [1902].)

The title to the beds of all lakes and ponds and of rivers navigable in fact as well up to the line of ordinary high-water mark within the boundaries of the State became vested in it at the instant of its admission into the Union, in trust to hold the same so as to preserve to the people forever the enjoyment of the waters of such lakes, ponds, and rivers to the same extent that the public are entitled to enjoy *tidal waters at the common law*. (*Illinois Steel Co. v. Bilot*, 109 Wis., 418, 425 [1901].)

Upon the admission of the State into the Union the title to such lands (i. e., under navigable waters) by operation of law, vested in it in trust to preserve to the people of the State forever the common rights of fishing and navigation, *and such other rights as are incident to public waters at common law*, which trusteeship is inviolable, the State being powerless to change the situation by in any way abdicating its trust. (*Pewaukee v. Savoy*, 103 Wis., 271, 274 [1889].)

All navigable streams of this State were designed originally to be public for all purposes, and * * * their character in that regard has not changed, notwithstanding the State has, for some purposes, parted with the title which was vested in it, in its sovereign capacity, in trust for the preservation and protection of public interests. (*Willow River Club v. Wade*, 100 Wis., 86, 106 (opinion of Marshall, J.), [1898].)

As the scope of the public interest in navigable waters of this State depends upon such "rights as are incident to public waters at common law" or "incident to tidal waters at common law," a statement of the common-law doctrines, so far as they admit of any clear statement, relating to waters, is necessary. While such a statement will include much that is elementary and uncontroverted, it is essential to an understanding of the present law governing this subject.

Public and Private Waters.

All waters are divided, on the basis of public rights, into two classes: (1) Public and (2) private. Public waters are such as are under the dominion and control of the Crown, as representing the state, for public or common purposes. Such dominion and control does not involve the ownership of the particles of water. Water, from its nature, is incapable of ownership, either by the state or the riparian proprietor. Water can only be *used*.^a Public waters are such as are of common or public use, and which pertain to the Crown as representing the community. Private waters are of private use.

Public waters pertain to the common or collective rights of the state. The use and enjoyment of them belong to everyone alike. No one may appropriate the common right to his private exclusive use. (Woolrych, *Waters*, pp. 1, 40-43; Schultes, *Aquatic Rights*, p. 5; Gould, *Waters*, part 1; Hale, *De Jure Maris*, ch. 1, 2.)

It is the right of *use* that is public. In the development of the law, however, the public right of use was associated with the ownership of

^a The use of water may, however, result in its severance and appropriation. For example, on nonnavigable streams the upper riparian proprietor might as against lower riparian owners appropriate and consume substantially all the water for his legitimate domestic purposes. Likewise, on navigable streams, the reasonable use of the water resulted in some appropriation and consumption. As will be pointed out later, the public use of water for a municipal water supply may result in a substantial severance and appropriation of the water.

the soil beneath the water, and the use was regarded as incident to the ownership of the soil; but there were rivers where the public right of use existed, although the ownership of the bed was private.

In *Blount v. Layard* (1891, 2, ch. 681, 689, note), Bowen, J., in speaking of the river Thames, says:

We are dealing with the Thames, which is not a tidal river at the place in question. But on the other hand, it is a navigable river—that is, all the Queen's subjects have the right of passing and repassing on it—and it is what is called in the old books a "King's Stream," by which is meant not that the soil must belong to the King, but that it is a highway and that the King is the natural guardian and conservator of a commodious and convenient passage of the river by his subjects.

To the same effect, *Grant v. Gordon*, cited in L. R., 2 App. Cas., 872.

The cause of the association of the public use with the public ownership of the bed is to be found in two factors: The topographical conditions of England; the origin and development of the law relating to the Crown's title to the bed of waters.

The sea, its arms, inlets, and bays, and a very few rivers comprised the waters of public interest, especially as the principal uses of waters during that period of the law's development were for navigation and fishing.

The distinction between governmental prerogatives and private property rights, and between the private and representative character of the Crown was a matter of historical development. The title of the Crown to the sea and its tributaries were incidents of his political power and dominion. It pertained to him as the most powerful and chief personage in the realm. (Selden, *Mare Clausum*, Bk. 2, c. 22, 24; Chitty's *Prerogative of the Crown*, 142, 173, 206; 3 Kent Com., 487.) As to whether he held them for himself, for his subjects, or for both, was not clear. When, in time, his representative character began to be perceived his title was dual. He held both in his public and in his private capacity. In his representative character he held the right of use and the title to the soil beneath the waters, as *jus publicum*. As an individual, the title and the use pertained to him, *jus privatum*. Even though this dual interest was recognized, the *jus privatum* or proprietary interest was always subject to the *jus publicum*. Even though he held the soil, *jus privatum*, he could not, while thus holding it himself, abridge or destroy the common use and enjoyment, nor could he grant to others his proprietary or private rights, released from the public right.

Hale *De Jure Maris*, ch. 6; Hargrave, 36.

The private or proprietary interest of the Crown in public waters was always doubted in England. (*Att'y Gen. v. London*, 1 H. L. Cases, 440; *Hall on the Seashore*, Appendix. It was repudiated in this country. *Bell v. Gough*, 23 N. J. L., 624; *McCreedy v. Va.*, 94 U. S., 391; *Clement v. Burns*, 43 N. H., 609, 617, 619; *Ill. Cent. R. Co. v. Ill.*, 146 U. S., 387.) The proprietary or private interest of the State in public waters was expressly repudiated in Wisconsin in *Rossmiller v. State* (114 Wis., 169).

Extent of the Crown Title.

The crown title pertained primarily to the sea. Without following in detail the development of the Crown's title, which was always attended with controversy, this much appears to have been settled at the time the American colonies attained independence: That the Crown, in its representative capacity, had, as against its subjects,

title to the soil beneath and control over so much of the sea as was in the territorial limits of the realm. The tide being the distinctive feature of the sea, the crown title included, therefore, all arms, inlets, bays, and all rivers flowing into the sea as far as the ebb and flow of the tide. Gould, Waters (3d ed., secs. 4, 5, 8-13).

The tide was made the test of the Crown's title to the bed. So far, then, as the public right of *use* depended upon the title to the bed being public also, the limit of the public right of use was the ebb and flow of the tide.

By thus associating the right of use and the title to the bed, the law of England is customarily stated as follows: Public waters include those the title to the soil under which and the right to use which are vested in the Crown for the public, and the Crown's title and the public use extend as far as the ebb and flow of the tide. Public waters, therefore, both as to use and to ownership of bed, extended *at least* thus far. But whether the ownership and use, or either, extended to nontidal waters was still in controversy at the time the United States attained independence. Above the ebb and flow of the tide, waters were usually regarded as private, both as to title to the bed and to the right of use. Such waters, however, if navigable, were conceded to be subject, at least, to some sort of easement of navigation in favor of the public.

In 1883 the question was regarded as not fully settled by Lord Denman, C. J., who, in *Williams v. Wilcox*, said: "It is clear that the channels of public navigable rivers were always highways; up to the point reached by the flow of the tide the soil was presumably in the Crown; and, above that point, whether the soil at common law was in the Crown or the owners of the adjacent lands (a point perhaps not free from doubt), there was at least a jurisdiction in the Crown, according to Sir Matthew Hale, 'to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage not only for ships and greater vessels, but also for smaller, as barges or boats.' In either case the right of the subject to pass up and down was complete." (Gould, Waters, 3d ed., secs. 46-51; Coulson & Forbes, Waters, p. 65.)

Nontidal or Fresh Waters.

While there are a number of fresh-water rivers of considerable size in England, by far the greater part of the water is tidal. The principal use to which water was put during the period the law was developing was navigation. Most of the navigable water in England was tidal and most of the tidal water was navigable. (Vernon-Harcourt on Rivers and Canals, ch. 3, p. 34; ch. 11, p. 155. The *Genesee Chief v. Fitzhugh*, 12 How., 443.)

The two terms came to be used interchangeably. Public waters, both as to title to bed and use, were navigable waters; and navigable waters, both as to title to bed and use, were public. So long as the interchange of terms was confined to waters that were in fact both tidal and navigable there was no serious controversy. Difficulty was encountered, however, when the question arose as to the status of waters nontidal but in fact navigable; such as the river Thames, above certain points, the Wey, and the Severn. Was the test of the public character of water its tidal quality or its navigable quality? If one looks to the principal use to which it was put by the public, its navigable quality would determine whether it was public or private. The chief interest of the public in the water was not the tide, but its navigable character.

The term "navigable" embraces within itself not merely the idea that the waters could be navigated in fact, but also the idea of publicity, so that saying waters were

public was equivalent, in a legal sense, to saying they were navigable. Yet the navigability in fact was the leading idea and was the ground of their publicity. * * * As a real and virtual test (of navigability), the tide is merely an arbitrary one. It is navigability *in fact*, which forms the foundation of navigability in law; and from the *fact* (of navigability) follows the appropriation to public use, and hence its publicity and legal navigability. (*McMamus v. Carmichael*, 3 Iowa, 1, 27, 30.)

But the public right of use of water was, in England, involved with the idea of public ownership of the soil beneath the water. To make navigability *in fact* the test of the public right of use would, if the use and the title must go together, extend the King's title to include beds of fresh-water streams, which had from time immemorial been regarded as private. The establishment of the King's title to soil beneath tide waters and to the shore between high and low water mark was accomplished only after much controversy and litigation. (Constable's case, 5 Coke, 106a; *Johnson v. Barret*, Aleyn, 10; *Hale De Jure Maris*, c. 4; *Atty. Gen. v. Philpot*, 4 Kay & J., 295.) Moreover, as the tide waters included most of the important waters, the same incentive for further extension of title to the beds of fresh waters did not exist. The opinion was not uncommon, however, that the title extended to all navigable water, whether tidal or not. (The Banne Fisheries, *Davies Rep.*, 55; *LeRoy v. Trinity House*, Sid., 86; *People ex rel Loomis v. Canal Appraisers*, 33 N. Y., 461.)

By the English rule which finally prevailed the title to the bed of fresh-water streams, even though navigable in fact, was in the riparian owner or owners, subject to a right of use in the public for navigation. (Coulson and Forbes, *Waters*, pp. 65, 66.)

Navigable in Fact: Navigable in Law.

The test of the public right of use of water was navigability; the test of the Crown's title to the soil beneath the water was the tide. If there were navigable waters which were not tidal, the right of the public use would necessarily extend beyond the right of title to the soil. To meet this embarrassment (and also because tidal waters included most of the navigable waters) there was originated the fiction "navigable in law," which meant no more than this: That in legal contemplation, for the purposes of determining the extent of the Crown's title to the soil beneath waters and to the seashore, no waters would be regarded navigable beyond the tide. The creation of this fiction, for the purpose of testing the scope of the Crown's title to the submerged land, did not, however, limit the public right of use to navigable tide water. Navigable *in fact* was the test of the extent of the public right of use.

The difficulty with respect to the question as to what streams are navigable arises from failure to distinguish between streams which are navigable and those in which the title is in the public. The mere fact that the title to the bed is in a private owner does not prevent the use of the stream for the purpose of navigation by the public. The King's title to the land under the water was limited by the flow of the tide. But as far as the tide flowed he had the title in the soil, and the use of the water was public, because he held the entire title in trust for his subjects. The only purpose for which it becomes a matter of importance to determine whether or not the tide flows is in ascertaining who owns the soil. The distinction does not affect the public easement in the water. (*Farnham, Waters*, sec. 23f.)

That the public right of use extended beyond the tide was well established, notwithstanding the doubt as to the public title to the soil.

William v. Wilcox (8 Ad. and Ell., 314); *Grant v. Gordon* (1 Burr., 292); *Blount v. Layard*, 1891 (2 Ch., 681); *Hale, De Jure Maris* (Ch. 1, 2).

In *Grant v. Gordon* (*supra*) it was held with reference to the river Spey, which was nontidal, but had been used for floating logs, that "a river by which the products of the county can be transported to the sea is a public benefit intrusted to the King as *pater patriæ* for the behoof of his subjects in general, which can be neither given away nor abridged by him, and that this transportation is the chief and primary use of the river, and if incompatible with fisheries along its coast will prevail over them."

Farnham on Waters (pp. 113, 114), in commenting on the test of public water, says:

Sir Matthew Hale (*De Jure Maris*, chs. 1 and 2) states the law as follows: "Fresh rivers, in point of propriety, are *prima facie* of a private interest; yet they may be under these two servitudes,—one of prerogative, belonging to the king, and another of public interest or belonging to the public in general. * * * The king by ancient right of prerogative hath had a certain interest in fresh rivers; (1) a right of franchise or privilege that no man shall set up a common ferry for all passengers; (2) an interest of pleasure or recreation, as the right of fowling or fishing in it; (3) an interest of jurisdiction, which extends to reformation and punishment of nuisances in all rivers that are of common passage, not only for ships and greater vessels, but also for smaller, as barges and boats, for as the common highways on the land are for the common passage, so this kind of rivers, whether fresh or salt, that bear boats or barges, are highways by water; and as the highways by land are called *altæ viæ regię*, so these public rivers for public passage are called *fluvii regales* and *haut streames le roy*, not in reference to the propriety of the river, but to the public use. And therefore the report of Sir John Davies in the Royal Fisheries of the Banne mistakes the reason of those books that call these streames le roy, as if they were so called in respect of propriety, for they are so called because they are of public use and under the king's special care and protection, whether the soil be his or not." Again he says, "There be some streams or rivers that are private, not only in propriety or ownership, but also in use, as little streams and rivers that are not a common passage for the king's people." Again, "There be other rivers, as well fresh as salt, that are of common or public use for carriage of boats and lighters. And these, whether they are fresh or salt, whether they flow and reflow or not, are *prima facie publici juris* common highways for man or goods, or both, from one inland town to another. Thus, the rivers of Wey, of Severn, of Thames, and divers others, as well above the bridges and ports as below, as well above the flowing of the sea as below, and as well where they are become to be of private propriety as in what parts they are of the king's propriety, are public rivers *juris publici*." Further, in considering the king's interest in salt water, he says that "a river is called an arm of the sea where the sea flows and reflows, and so far only as the sea so flows and reflows, so that the river of Thames, above Kingston and the river of Severn above Tewksbury, though there they are public rivers, yet are not arms of the sea." There is certainly no distinction between fresh and salt rivers in point of navigability in that passage. In fact, all rivers capable of being navigated are called public, which is a term applied in the civil law to navigable rivers. Subsequently, when discussing the rights of individuals in waters in which the tide ebbs and flows, he designates them as creeks or arms of the sea. And he states that the king may also grant that very interest itself, viz, a navigable river that is an arm of the sea. In all this discussion there is no such distinction as navigable and nonnavigable, as depending upon the flow of the tide. All rivers are *publici juris* which are capable of being navigated, and whenever Lord Hale wishes to make a distinction depending on tide water, he always says navigable waters where the tide ebbs and flows, thereby plainly indicating that he did not consider it sufficient to refer to tidal water by the word navigable only.

Basis of the Public Right of Use Beyond the Tide.

As previously stated, the English cases were conflicting as to the extent of the King's title to the soil beneath waters. After the doctrine of private ownership to the soil under fresh waters began to gain recognition the cases were obscure as to the basis of the public right to use such streams, and this obscurity was never removed [nor

was a settled doctrine enunciated by the English courts until after the independence of the United States.

In England prescription appears to be the ground upon which the right of navigation in these waters now depends, and in early decisions in this country it was held that fresh rivers, though navigable in fact, are not open to the public unless they have been long used for navigation, or have been declared highways by the legislature. This is contrary to Lord Hale, who makes no distinction in this respect between tidal and fresh navigable rivers, and says that both are common highways and *prima facie publici juris*, whether they are fresh or salt, whether they flow and reflow or not. If proof of long-continued exercise of the right to pass over the soil covered by the water were required in newly settled colonies and territories, in which the rivers are often the chief means of transportation and travel, and the riparian owners were permitted in the absence of such evidence to obstruct large rivers by dams, bridges, or booms, or to demand compensation from navigators, it would amount to a serious grievance. (Gould on Waters, sec. 53; Woolrych on Waters, 31; Phear, Rights of Water, 15n.)

See further, Gould, Waters (sec. 55), on the anomalous nature of the explanation given for the basis of the public right. See also, Coulson and Forbes on Waters (p. 453, et seq.).

No satisfactory explanation having been found by the English courts for the existence of this right in the public to navigate private nontidal streams, the American courts, especially in the earlier decisions, were at a loss to explain how such right came about. It was often said that this right of navigation extended to all waters having a natural capacity for navigation, and that there was a general presumption of an easement. But, as pointed out by Mr. Phear, in his Rights on Water, 15n, there is no basis for such a presumption. It was also said that the owners of lands adjoining such streams could not prevent the acquisition of the easement and were not entitled to compensation for such subjection of private property to the common use of navigation. But an easement based upon long use or prescription can not be acquired unless the owner of the servient estate is capable of preventing by action the acquisition of it. (*Sturges v. Bridgman*, 11 Ch. D., 852; *Gilmore v. Driscoll*, 122 Mass., 199, 207; *Mitchell v. Major*, 49 Ga., 19.) As stated by Marshall, J., in *Willow River Club v. Wade* (100 Wis., 86, 109):

It must be conceded that the absolute private ownership of the bed of a navigable stream is inconsistent with its being public for any purpose; that if such be the nature of the riparian proprietor's title, or if it be subject only to the easement of navigation, then the exclusive right of fishing goes with such ownership.

The court, however, held that the right of fishing did not go with the private ownership of the soil.

The true explanation is to be found in the fact that the public right of navigation is not an easement at all, depending upon grant or prescription, but is a right of use incident to and growing out of the public nature of the water. No other rational explanation can be given for the existence of this right. In the Wisconsin River, for example, the public had from the beginning of the State's history a right of navigation. This right is not founded on prescription or grant; it is not an easement. In England, where nontidal, though navigable, streams were private, it may have been necessary to create the fiction of an easement. In this country, however, where, as will be pointed out, the test of public waters was not the tide, but the navigable character of the water, it is a misnomer to describe the public right as an easement. By changing the test of what constitutes public water from the tide to navigability in fact all navigable water is public and may be used by the public for any legitimate purpose, such as navigation, fishing, and taking of ice.

Status of Waters in the United States.

The English law limiting public water, where both the title to the soil and the use were in the Crown, to the tide, received a fundamental modification in this country because of the topographical conditions and the presence of large bodies of navigable fresh water.

This modification can best be explained in connection with the cases discussing the admiralty jurisdiction of the Federal Government. In dealing with the scope of admiralty jurisdiction, the Federal Supreme Court held that the tide as the test of navigability of waters was inapplicable, and substituted therefor navigability in fact, thus abandoning the fiction of navigability in law. (*The Genesee Chief v. Fitzhugh*, 12 How., 443; *Barney v. Keokuk*, 94 U. S., 324.)

In the first case, Taney, C. J., said: (455)

In England, therefore, tide water and navigable water are synonymous terms, and tide water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to public navigable waters. At the time the Constitution of the United States was adopted, and our courts of admiralty went into operation, the definition which had been adopted in England was equally proper here. In the old thirteen States the far greater part of the navigable waters are tide waters. And in the States which were at that period in any degree commercial, and where courts of admiralty were called on to exercise their jurisdiction, every public river was tide water to the head of navigation. And, indeed, until the discovery of steamboats, there could be nothing like foreign commerce upon waters with an unchanging current resisting the upward passage. The courts of the United States, therefore, naturally adopted the English mode of defining a public river, and consequently the boundary of admiralty jurisdiction. It measured it by tide water. And that definition, having found its way into our courts, became, after a time, the familiar mode of describing a public river, and was repeated, as cases occurred, without particularly examining whether it was as universally applicable in this country as it was in England. If there were no waters in the United States which are public, as contradistinguished from private, except where there is tide, then unquestionably here as well as in England, tide water must be the limits of admiralty power. And as the English definition was adopted in our courts, and constantly used in judicial proceedings and forms of pleadings, borrowed from England, the public character of the river was in process of time lost sight of, and the jurisdiction of the admiralty treated as if it was limited by the tide. *The description of a public navigable river was substituted in the place of the thing intended to be described.* And under the natural influence of precedents and established forms, a definition originally correct, was adhered to and acted on, after it had ceased, from a change in circumstances, to be the true description of public waters.

The abandonment of the *fiction* and the adoption of the *fact* of navigability would logically extend the boundaries of public waters to include all navigable waters. If the tide was made the test in England for ascertaining the extent of public waters (both as to public right of use and title to the soil), the substitution of navigability in fact for the tidal test would extend the scope of public waters to all waters navigable in fact. So far as the Federal Supreme Court has reached an independent judgment, unhampered by local laws of any State, it has held that public waters of the Federal Government are all waters navigable in fact. An apparent inconsistency, however, appears in the federal decisions when the federal courts are called upon to decide upon the title to the soil beneath navigable waters. This inconsistency may be explained as follows: By the terms of admission of the States formed from the Northwest Territory the Federal Government retained the right to dispose of the public lands within such territory after it was incorporated in

the States. In federal land patents covering land bordering on navigable water the title which the patentee obtains from the Federal Government does not extend beyond the meander line run by the government surveyors. What title or right the patentee gets to the submerged land beyond the meander line has been left to the determination of the respective States in which the land lies.

Whatever incidents and rights attach to the ownership of property conveyed by the United States bordering on navigable streams will be determined by the States in which it is situated. Grants by the United States of its public lands bounded on streams and other waters * * * are to be construed, as to their effect, according to the law of the State in which the lands lie. (*Barney v. Keokuk*, 94 U. S., 337, 338; *Packer v. Bird*, 137 U. S., 661, 671; *Hardin v. Jordan*, 140 U. S., 371, 384; *Kaukauna W. P. Co. v. B. B. and M. Canal Co.*, 142 U. S., 524; *Eldridge v. Trezevant*, 160 U. S., 466.)

Acting under this power to determine the rights of patentees beyond the meander line, the majority of the States in this country have declared the title to the submerged soil of rivers to be in the riparian patentee. While recognizing that the tide was not, as in England, a practical test of navigable water, and therefore of the public interest in the water, many States have nevertheless adopted, for the purpose of determining the title to the beds of navigable rivers, the fiction of "navigable in law." These States extend the title of riparian patentees to the submerged soil, thus limiting the public title to such soil as lies under tide waters, or what is equivalent to waters "navigable in law." The effect of this holding is to leave the scope of public waters, with respect to the title to the submerged soil, exactly as it was in England and nullifying the effect of the change of test. The sole object in abandoning the English test of tide was to make public the large bodies of fresh water in this country, which, if the English test were followed, would be private water to the extent at least that the title to the soil would be in the riparian owner. When litigation comes into the federal courts respecting the title to submerged soil, these courts will follow the law of the State where the land lies. As the state courts are not agreed as to the extent of the title of the riparian owner to the submerged soil, the decisions of the federal courts are not harmonious. If, for example, a case comes into the federal courts concerning submerged land in Iowa, the federal courts will follow the law of Iowa to the effect that the title is in the public. On the other hand, if a case arises affecting land in Wisconsin, the court will follow the law of Wisconsin to the effect that the title is in the riparian proprietor.

Public Waters in Wisconsin.

The Wisconsin court has followed the change of test of public waters as above indicated. All waters navigable in fact are public waters. In *Jones v. Pettibone* (2 Wis., 308 [1853]), however, the Wisconsin supreme court sustained an exception to a ruling of the trial court that a purchaser of land bordering on a meandered stream was limited to the meander line, thus extending the private title to the soil under navigable rivers to the center thread of the stream. This holding has been frequently followed. (*Walker v. Stephenson*, 2 Wis., 384; *Mariner v. Schulte*, 13 Wis., 692; *Wis. River Imp. Co. v. Lyons*, 30 Wis., 61; *Olson v. Merrill*, 42 Wis., 203.) The holding of *Jones v. Pettibone*, and the cases following it is limited to rivers. As to all navigable waters other than rivers, the court has consistently and rigidly followed the consequences of the change of test.

The beds of all lakes and the waters thereof are vested in the State for all public uses. (*McLennan v. Prentice*, 85 Wis., 427; *Priewe v. Wis., etc., Co.*, 93 Wis., 534; *Ill. Steel Co. v. Bilot*, 109 Wis., 418; *Rossmiller v. State*, 114 Wis., 169.)

All navigable waters in this State, therefore, except rivers, are public both as to the title to the bed and the right of use. As to rivers, by an inconsistent and illogical application of the change of test of what constitutes public water, the title to the beds has been recognized as in the riparian proprietor. While the public right of use of navigable waters and the public right of title to soil thereunder has been established as to all navigable waters except rivers, as to rivers the title to the submerged soil has been regarded as vested in the riparian proprietor, but the public right of use of such rivers still exists.

As will be more fully stated later, the scope of this public right of use remains to be determined. That it has not been exhaustively defined is indicated by the opinion of Marshall, J., in *Willow River Club v. Wade* (100 Wis., 86, 104):

Though such title (that is, the soil beneath rivers), by force of state policy, has passed from it to private ownership, such ownership is of such a qualified character as not in any way to interfere with the character of the stream as public waters; *not public in the sense of such rivers as at common law were merely subject to the right of passage, but public by the common-law test of navigability.*

This construction placed by our court upon the federal patents of lands, by which the title of the riparian owner was held to extend to the center of the stream, did not involve a change of the character of the water from public to private. There is no decision holding that as a result of such construction the waters flowing over the land thus judicially recognized to be in the riparian owner lost any of the incidents of public waters at common law. Moreover, this result does not necessarily follow from such construction; at least the court has never decided that such a result *has* followed. There is no decision indicating what effect, if any, upon cutting down the public nature of water such construction will have. There is, on the other hand, much in the court's decisions to indicate that the public right of use has in no way been impaired by this construction.

Origin and Nature of the Riparian Owner's Title to the Bed.

Whatever private ownership exists in the soil beneath navigable waters of this State does not proceed from the United States under its patents. (*Packer v. Bird*, 137 U. S., 661; *Barney v. Keokuk*, 94 U. S., 524; *Railroad Co. v. Schurmeier*, 7 Wall., 272; *Illinois Steel Co. v. Bilot*, 129 Wis., 418; *Wright v. Day*, 33 Wis., 260.)

Prior to the admission of Wisconsin no grants were made of the territory now comprised within the State divesting the Federal Government of its title to the soil under all navigable waters.

In *Shively v. Bowlby* (152 U. S., 1, 48) while recognizing that Congress has the power to make grants below high-water mark of navigable waters in any Territory of the United States to promote some public purpose, says:

But Congress has never undertaken by general laws to dispose of such lands. And the reasons are not far to seek.

As has been seen, by the law of England, the title in fee, or *jus privatum*, of the King or his grantee was, in the phrase of Lord Hale, "charged with and subject to that *jus publicum* which belongs to the King's subject," or, as he elsewhere puts it, "is clothed

and superinduced with a *jus publicum*, wherein both natives and foreigners in peace with this Kingdom are interested by reason of common commerce, trade, and intercourse." (Hargrave's Law Tracts, 36, 84.) In the words of Chief Justice Taney, "The country," discovered and settled by Englishmen, "was held by the King in his public and regal character as the representative of the nation, and in trust for them;" and the title and the dominion of the tide waters and of the soil under them, in each colony, passed by the royal charter to the grantees as "a trust for the common use of the new community about to be established;" and, upon the American Revolution, vested absolutely in the people of each State "for their own common use, subject only to the rights since surrendered by the Constitution to the General Government." (Martin v. Waddell, 16 Pet., 367, 409-411.) As observed by Mr. Justice Curtis, "This soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights." (Smith v. Maryland, 18 How., 71, 74.) "The title to the shore and lands under tide water," said Justice Bradley, "is regarded as incidental to the sovereignty of the State—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery." (Hardin v. Jordan, 140 U. S., 371, 381.) And the Territories acquired by Congress, whether by deed of cession from the original States, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as States, upon an equal footing with the original States in all respects; and the title and dominion of the tide waters and the lands under them are held by the United States for the benefit of the whole people, and, as this court has often said, in cases above cited, "in trust for the future States." (Pollard v. Hagan, 3 How., 212, 221, 222; Weber v. Harbor Commissioners, 18 Wall., 57, 65; Knight v. United States Land Association, 142 U. S., 161, 183.)

The Congress of the United States in disposing of the public lands has constantly acted upon the theory that those lands, whether in the interior or on the coast above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State after it shall have become a completely organized community.

In *Illinois Steel Co. v. Bilot* (109 Wis., 418, 426) the court said:

The United States never had title in the Northwest Territory, out of which this State was carved, to the beds of lakes, ponds, and navigable rivers, except in trust for public purposes; and its trust in that regard was transferred to the State, and must there continue forever, so far as necessary to the enjoyment thereof by the people of this Commonwealth. Whatever concession the State may make without violating the essentials of the trust, it has been held, can properly be made to riparian proprietors. Under that, by long-established judicial policy, which has become a rule of property, a *qualified title* to submerged lands of rivers navigable in fact has been conceded to the owners of the shores. Otherwise the title to lands under all public waters is in the State, and it is powerless to change it.

The title to the beds of all navigable streams of this State passed to the State from the United States with all the incidents of public waters at common law. (*Willow River Club v. Wade*, 100 Wis., 86, 111.)

See also *Rossmiller v. State*, 114 Wis., 169, 186; *Barney v. Keokuk*, 94 U. S., 324; *Illinois Cent. R. Co. v. Illinois*, 142 U. S., 387.

Lakes and rivers, as to their public character and the ownership of the beds, are governed by the same principles.

The title of the State to submerged lands under navigable waters, whether lakes or rivers, came to it at the same time, subject to the same incidents, and for the same purposes, and must necessarily be governed by the same rules.

Willow River Club v. Wade (100 Wis., 86, 113, 114).

The title to the soil under navigable waters which the State acquired upon its admission is held by virtue of its sovereign or representative capacity, analogous to the *jus publicum*, at common law.

The trust with which they are held, therefore, is governmental, and can not be alienated (p. 455). * * * This follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested (p. 456). * * * The people of each State * * * hold the absolute right to all their navigable waters, and the soils under them, for their own common use. * * * The bed or soil of navigable waters is held by the people of the State in their character as sovereign in trust for public uses for which they are adapted (p. 457). (*Illinois Central R. Co. v. Illinois*, 146 U. S. 387.)

See also Attorney-General *ex rel Askew v. Smith*, 109 Wis., 539; *Rossmiller v. State*, 114 Wis., 169.

Whatever title to the beds of navigable streams has passed to riparian owners, such title is subject to all the trusts and obligations in favor of the public as when the title was in the State. The State could not directly or indirectly part with the title freed from the *jus publicum*. (*McLennan v. Prentice*, 85 Wis., 427; *Priewe v. Wis.*, etc., Co., 93 Wis., 534, 550; 103 Wis., 537; Attorney-Gen. *ex rel Askew v. Smith*, 109 Wis., 532.)

In *Willow River Club v. Wade* (100 Wis., 86, 111, 113, 115, 116) Marshall, J., said:

Such title proceeded from the State, however, by force of its policy, as a concession to the holder of the patent title, and became appurtenant thereto upon such title being conveyed by the Government—a concession not resting for its validity on any direct act of the State through its legislative body, but on mere state policy as declared by the court and acquiescence therein for so long a time that it can not be changed without working great hardship. * * * Obviously (p. 113) the mere declaration of a fact by the courts, so long adhered to without challenge as to give it effect as a verity and a rule of property, can go no further than the State could go pursuant to legislative authority. * * * The beds of navigable waters which were once vested in the State as a trust for public purposes, have not been, and could not be, parted with, except subject to that trust. * * * There is no declaration by this court that can be pointed to showing that the character of such (navigable) streams, for any of the purposes incident to public waters, has been affected by any abdication by the State of its trusteeship for such purposes. * * * Only for such private purposes as do not interfere with such public purposes has the title (to said soil under navigable streams) been surrendered to the riparian proprietors.

It is contended that the lands within the limits of Wisconsin were acquired by the United States from Virginia by deed of cession in 1784 upon the condition that—

the States to be formed out of the northwest territory shall be admitted into the Union "having the same rights of sovereignty, freedom, and independence as the other States," or "the original States" on the one side, and on the other side, "That all the lands * * * shall be considered as a common fund for the use and benefit of such of the United States as have become, or shall become, members of the confederation or federal alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatsoever," that to protect itself against state action in hostility to the execution of this trust, the United States required the assurance that Wisconsin would "never interfere with the primary disposal of the soil;" that this bargain between Virginia and the United States must be construed in view of the then conditions, and the then views, respecting sovereignty on the one side, and property, water-power property, on the other side. If the right to use the flow of a nontidal, navigable river was then, according to common understanding, property—if the courts would then hold it to be property—parcel of the riparian estate, then the State never owned it, or any interest in it except as a member of the federation, or other than the right to take for public use on making just compensation. But if the court would then have held it to be a sovereign right, it passed to the State by the Virginia deed of cession and the enabling act."

The contention is undoubtedly true to the extent that the United States has retained full control of the primary disposition of non-submerged land, and that the title to uplands is derived from the federal patents. As already pointed out, however, the federal courts have uniformly held that the patents confer no rights beyond the meander line, and whatever rights the patentee gets beyond that line, either in the submerged land or the right to use the water, is to be determined by the law of the State in which the land is located. While it is true that riparian rights are parcel of the riparian or bank estate, the scope and content of the riparian rights are dependent upon corresponding rights in other riparian owners and upon certain rights in the public. Whether the riparian right included a water power depended, as has been shown, upon the natural physical conditions of the stream, which determined whether the water could be turned to this use without encroaching upon the property or rights of others, and depended further upon the extent to which the public had a right to use the water. As the law stood in 1784, the date of the Virginia cession, whether a water power was parcel of the riparian estate would be determined by the same general conditions as exist to-day. It is not possible to assert dogmatically that a water power, at a particular point in time, is or is not a part of the riparian estate. It may, or may not be, depending upon circumstances. That was true in 1784, and it is true to-day. If the riparian owner within the limits of his own land can get a sufficient fall of water to turn the machinery without encroaching upon the reciprocal rights of other riparian owners or encroaching upon the rights of the public, whatever they may be, a water power is part of the riparian estate. But his right is controlled by the correlative rights of other riparians and the paramount right of the public. The line between public rights and private rights was no more sharply drawn in 1784 than now. The classification of waters into public and private was a part of the common law of England and Virginia in 1784, and it was recognized that the scope of the riparian right was narrower with respect to lands bordering on public waters than lands bordering on private waters. To what extent the scope of the riparian right on public waters would be restricted by the exercise of public rights would necessarily have to be left to be determined by the development of the law with respect to the scope of public rights and activities in general.

It is further contended that the so-called trust doctrine and the attendant incident of inalienability announced in *Illinois Central Railroad Co. v. Illinois* (146 U. S., 389) is inapplicable because in *Attorney-General v. Eau Claire* (37 Wis., 400 [1875]) and *State v. Eau Claire* (40 Wis., 533 [1876]) the court recognized that the water power developed as an incident to the public work of providing a municipal water supply could be alienated.

The two cases referred to were decided prior to the case of the *Illinois Central Railroad v. Illinois*, which case has been consistently followed in later Wisconsin cases. Further, in the two cases mentioned the validity of any proposed alienation was never drawn in question; and, further, the doctrine of inalienability announced in *Illinois Central Railroad v. Illinois* does not prohibit all alienation. The distinction between a total alienation and a partial alienation in

aid or promotion of the public interest was clearly drawn by Mr. Justice Field in that case, where he says:

The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purposes, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures, in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and water remaining that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, can not be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which, when occupied, do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested that the language of the adjudged cases can be reconciled. The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soil under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace.

Burden of Limiting the Public Right of Use to Navigation Merely is upon the Riparian Proprietors.

Wisconsin, upon her admission to the Union, acquired title to the beds of all lakes, ponds, and navigable rivers, and the waters thereon in trust for all public purposes. The riparian owners derived title to the lands bordering on navigable waters under patents from the United States. It is claimed that the right to use the water for power is parcel of the riparian estate and is included in the grant of the upland. What rights the patentee took under his patent to riparian land is a question of interpretation and construction. The burden is upon the patentee to establish the scope of his rights under the grant. The rule is well settled that grants by the sovereign are to be construed strictly against the grantee. Those who claim in derogation of the common right must establish their claim in clear and unequivocal terms. Nothing is to be taken by implication. Those who contend that the grant of the upland carried with it all riparian rights, excepting only the right in the public to navigation, should establish their contention by something more tangible than implication and inference. (*Charles River Bridge v. Warren Bridge*, 11 Pet., 420; *Bradley v. Railroad Co.*, 21 Conn., 294, 306; *Cooley*, Constitutional Limitations, 7th ed., 565; *Devlin*, Deeds, sec. 848.)

Scope of the Public Right of Use.

The riparian proprietor, even though the owner by judicial sanction of the bed of navigable rivers, holds the title subject to the paramount right of the public to make any beneficial use of the water for

the public. The scope of this paramount public right has never been exhaustively determined. In general, it includes all rights at common law in navigable waters. (*Willow River Club v. Wade*, 100 Wis., 86; *Pewaukee v. Savoy*, 103 Wis., 271, 274; *Illinois Steel Co. v. Bilot*, 109 Wis., 418, 425; *Rossmiller v. State*, 114 Wis., 169, 186.) In particular, it includes the right of navigation. (*Jones v. Pettibone*, 2 Wis., 308 (1853); *Boom Co. v. Riley*, 46 Wis., 237; *Cohn v. Boom Co.*, 47 Wis., 314; *Black River, etc. Co. v. La Crosse, etc., Co.*, 54 Wis., 659; and of fishing, *Willow River Club v. Wade*, 100 Wis., 86; and of taking ice, *Rossmiller v. State*, 114 Wis., 169, 186.)^a This much has been decided. In *Atty.-Gen. v. Eau Claire* (40 Wis., 533), is an indication that the public right includes the right to use the water by a municipality for domestic supply. It has never been decided that the public right of use extends *only* to navigation and fishing. It has never been decided that the public right does *not* include the use of waters to develop power for public purposes. The scope of the right is not defined by "right of navigation and of fishing." Those are words of description and not words of definition. The scope of the right is defined by "all beneficial uses to which the water can be put for the public." Navigation and fishing, taking ice, etc., are examples merely.

* * * the waters in a navigable river, or other navigable body of water, are so far the property of the State that the State may control them for public purposes, in their flow or otherwise, without making any compensation to riparian owners upon the borders of such streams or bodies of water * * *. The right of the riparian owner to have the water of a navigable stream flow past his lands adjoining the same as they were accustomed to flow is as perfect against everybody *except the State*, or some corporation or person standing in its stead, as it is in the case of unnavigable streams; and that right does not * * * depend upon his ownership of the soil under the water, but upon his riparian ownership, and the right of the State to control the waters of such streams in the public interest is the same whether the ownership of the soil under the water be in the State or in the riparian owner. The doctrine * * * has * * * been fully adopted by this court in all cases where the interference with the waters of a navigable stream has been for the improvement of the navigation thereof. Whether this court has decided or will decide that the State may, for any and *all public purposes*, interfere with the waters of a navigable stream, whereby injury may result to the riparian owner, without making compensation therefor, need not be determined in this case. (*Black River Imp. Co. v. La Crosse, etc., Co.*, 54 Wis., 659, 681-682.)

Public Right of Use is Not an Easement Merely.

By changing the test of public waters from tidal to navigability in fact no change in the nature and scope of the public right of use was made. Public waters were none the less public as to use under the new test. The word navigable was used to test the nature of the water, whether public or private. It did not describe the nature and scope of the public right of the use in waters found by such test to be public. While navigability was made the test of what con-

^a In *Reyson v. Roate* (92 Wis., 543 [1896]), plaintiff, who was a lessee of a mill and water power, but who was not a riparian owner, sought to maintain trespass against defendant who cut and removed ice from the mill pond. *Held*, that the action would not lie. Ice forming on a navigable stream, the title to which is in the riparian proprietors, is considered a part of the realty, as an accretion. Hence, plaintiff not being a riparian owner, could not sue. The case, however, does not decide anything as to the public rights. For example, if to navigate the stream it became necessary to break up the ice or prevent its formation, the riparian owner could not object. Nor does the case decide that the riparian owner could prevent the public from cutting ice. The right of the riparian owner and of the public are not in issue.

stitutes public waters, it was not made the test of the *scope* of the public use of such waters.

The expressions "easement of passage," "easement of navigation" originated in England to describe the status of the public rights in navigable private fresh waters, and when used in that connection are approximately correct; for as the law was finally settled in England an easement of passage came to be the only right which the public had in such waters. The use of such expressions in this State in discussions as to the extent of public and private rights in navigable waters can mean no more than a convenient term of description to designate the larger idea. The title to the beds of all navigable waters once was vested in the State in its sovereign capacity—

in trust for legitimate public uses such as fishing, navigation, and the like. (Winslow, J., in Atty. Gen. ex rel. Askew v. Smith, 109 Wis., 532, 539.)

Whatever title may have come to be recognized in riparian owners is subject to all the beneficial uses of the water by the public. The right of public use is just as complete notwithstanding the fact that the title may be in private hands. The expression, therefore, of "easement" is descriptive merely. For example, easement is synonymous with—

right of the public to regulate, control, and direct the flow of the navigable waters, to impede or accelerate such flow, etc. (Wis. River Imp. Co. v. Lyon, 30 Wis., 61, 65.)

The public interest is dominate; the private interest is subordinate. The riparian's—

right * * * rests * * * upon a passive or implied license by the public, and is subordinate to the public use and may be regulated or prohibited by law. (Ryan, J., in Cohn v. Wausau Boom Co., 47 Wis., 314, 322.)

The Crown in England did not hold *easements* in public waters in trust for its subjects, and the State when it succeeded to the Crown's title did not acquire easements in trust.

Even conceding that the term easement adequately describes the public rights, the scope of the easement has been broadened much beyond the mere right of passage. For example, it is made as broad as public rights in "tidal water at common law" (Rossmiller v. State, 114 Wis., 169, 186); to include "subject to such rights as are incident to public waters at common law" (Pewaukee v. Savoy, 103 Wis., 271, 274).

But it was also held, in Jones v. Pettibone (2 Wis., 319) that the title of the purchaser to the center of the stream was taken subject to the public easement or right of passage and navigation, and when the nature and extent of this easement or right are considered, it will be found for this purpose to be almost or quite immaterial whether he be regarded as holding to the center of the river or only to the margin of it. This easement, or right of the public to regulate, control, and direct the flow of the navigable waters, to impede or accelerate such flow, to deepen the channel or to remove obstructions found in it, or to change the direction of the current from one bank of the stream to the other, or to make an entirely new channel, and, in short, to do anything within the banks of the stream itself which may be considered for the benefit and improvement of commerce and navigation will be found to be a most extensive and absolute one. (Wis. Riv. Imp. Co. v. Lyon, 30 Wis., 61, 65.)

So far as the rights of the public are concerned, it is obvious that it makes little difference whether the riparian proprietor is regarded as holding to the center of the stream, or whether his title terminates at the margin thereof; because, in either case, the public has the right to improve, regulate, and control the bed of the stream and the flow of the waters therein in the interest of navigation and commerce. (Delaplaine v. C. & N. W. Ry. Co., 42 Wis., 214, 225.)

It is settled in this State that a riparian owner of navigable water may construct in front of his land, in shoal water, proper wharves, piers, and booms, in aid of navi-

gation, at his peril of obstructing it, far enough to reach actually navigable water. This is properly a riparian right, resting on title to the bank, and not upon title to the soil under the water. It is a private right, however, resting, in the absence of prohibition, upon a passive or implied license by the public; is subordinate to the public use, and may be regulated or prohibited by law. (Cohn v. Wausau Boom Co., 47 Wis., 314, 322.)

Speaking of the rule in Wisconsin, Gould on Waters, section 75, says:

But the title of the riparian proprietor, extending *usque ad filum aquae*, is held in this State to be not only subject to the public right of navigation, but also to the right of the State to regulate the flow of the water and to do anything within the banks which the interests of commerce require.

Uses to which Public Waters may be put: Characteristics of Public Waters.

From the foregoing propositions, it is apparent that by changing the test of public waters from tidal to navigable in fact, all waters in Wisconsin which are in fact navigable are public waters; not public in the sense that the particles of water are owned by the State as property, but public in the sense that they may be used and enjoyed by the public for any legitimate public purpose.^a As said by Marshall, J., in his opinion in Willow River Club v. Wade (100 Wis., 86, 116):

The waters of the State belong to the State, not for one public purpose only, but for all public purposes originally designed, and which should have been, and should be, most carefully guarded. It is open to serious doubt as to whether the surrender to private ownership of the property of the State in submerged lands, to any extent, was not a mistake. Certain it is that such title, in all territory out of which this and other northwestern States were carved, was vested in them in trust for public purposes of the highest importance, which have grown, and are likely to grow, as time continues. Probably, if such importance had been fully foreseen at the start, the State's interests would have been more rigidly and jealously guarded, and private ownership not been allowed to invade at all, either the public title or the public use; certainly not, without consideration, by mere operation of state policy judicially declared.

In Farnham on Waters (pp. 170-171), it is stated:

Whether the title is in the Crown or in a private individual, it is subject to the public use, to the injury of which the private title can never be used. * * * The use for passage is the most important one to which the water can be put and with this right it is universally agreed that the owner of the soil can not interfere. If in any case the fishery at a particular place is of such importance to the public that the public should have a right to exercise it, it would be within the true line of the development of the law to hold that such use was within the original purpose of the highway, so that the public right would extend to it. * * * The same considerations would apply in extending or withholding the right to take ice from the water, or to withdrawing the water itself, the title of the individual being held subordinate to those uses which public policy requires to be extended to the public. The common law has consistently developed according to these principles.

That there is a fundamental difference between what is public and what is private water is illustrated by the following cases:

In Massachusetts, by the colonial ordinances of 1641-1647, it was in substance provided that all ponds above a certain size are public property, like tide waters, both with respect to the soil under them, and the right of reasonable use for all lawful purposes, including fishing, fowling, boating, skating, bathing, the taking of ice for use

^a It is not feasible here to make an exhaustive statement of what constitutes a legitimate public purpose. It is sufficient for the present to cite as an example the use of water for municipal water supply, or the development of hydraulic power for municipal lighting.

or for sale, or of the water for domestic or agricultural purposes or for use in the arts. (*W. Roxbury v. Stoddard*, 7 Allen, 158; *Cummings v. Barrett*, 10 Cush., 186, 188; *Fay v. Salem Aqueduct Co.*, 111 Mass., 27.) Massachusetts followed the English test of public water, namely, the tide, and only tidal waters were public. By the ordinance, however, ponds were made public to the same extent as tidal waters. The ordinance being in force in Maine, the same rule prevails there. In Washington the title to all navigable lakes is by the constitution retained in the public. (*McCue v. Bellingham Bay Water Co.*, 5 Wash., 156.)

Large ponds being by virtue of the ordinance public waters may be devoted to any legitimate public use, as for example, municipal water supply. This was held in the following cases:

Watuppa Reservoir Co. v. Fall River (147 Mass., 548 [1888]).

In this case the plaintiff company, composed solely of the owners of manufacturing establishments on the only outlet of a great pond and of the bed and land on either side of the stream, was incorporated for the purpose of constructing a reservoir of water in the pond by erecting a dam across such outlet for the benefit of such establishments, and at great expense acquired flowage rights all around the pond, built the dam, raised the water, and continued to maintain its reservoir. The city of Fall River was authorized by the legislature to take a certain quantity of the waters of the pond and apply them to all domestic uses, the extinguishment of fires, and to the public uses of the city, without being liable to pay any other damages than the State itself would be legally liable to pay. The city took the water in the authorized quantity, which substantially diminished the flow of the stream and caused actual injury to the water power of the plaintiff. In an action in equity to enjoin the withdrawal of the water on the ground that the statute authorizing such withdrawal without compensation to the plaintiff was unconstitutional, the court held that (p. 557):

Under the ordinance, the State owns the great ponds as public property held in trust for public uses. It has not only the *jus privatum*, the ownership of the soil, but also the *jus publicum*, and the right to control and regulate the public uses to which the ponds shall be applied. * * *

In view of the rights and powers of the State in and over the great ponds, it seems clear that the rights of proprietors owning land either on the pond or on any stream flowing from it can not be decided by the rules of the common law applicable to ordinary streams. They must be determined with reference to the ordinance and the rule of property established by it, and we are of opinion that they must be regarded as subordinate and subject to the paramount rights of the public declared by the ordinance. All who take and hold property liable to be affected by this rule of property take and hold under and in subordination to it. Each grant carries with it an implied reservation of these paramount rights, unless the terms of the grant exclude such reservation; so that the grant from the State of land upon a stream flowing from a great pond did not convey an unqualified fee with the right to enjoy the usual and natural flow of the stream, but a qualified right, subject to the superior right of the State to use the pond and its waters for other public uses if the exigencies of the public for whom it holds the pond in trust demand it. * * * In the cases at bar, by the act of 1886, the legislature authorizes the city of Fall River to draw daily 1,500,000 gallons of water from the North Watuppa Pond, and to "apply the water taken under this act to all domestic uses, the extinguishment of fires, and to the public uses of the city." These are all public purposes. The legislature, acting on the conviction that an abundant supply of pure water to the people is of paramount importance, has deemed it to be a wise public policy to appropriate the waters of this pond to those public uses, without making compensation to those who, owning land on the natural stream flowing from it, have been accustomed to use the water for power as it flows

through the stream. Such owners have no vested rights in the waters of the pond, and a majority of the court is of the opinion that the Commonwealth may thus appropriate the waters by its direct action, or may authorize a city or town to do so, without being legally liable to pay any damages to the littoral owners on the pond or on the stream.

Sprague v. Minon (195 Mass., 581, 583 [1907]).

Bill in equity to enforce certain rules of the metropolitan water and sewage board with regard to the use of a lake set aside as a reservoir for water supply. The regulation forbade anyone from boating upon such lake without a license from the board. Plaintiff, a riparian owner with a wharf, had been accustomed to use the lake for boating. He denied the right of the board to keep him off. Held,

There is no doubt that the control of the great ponds in the public interest is in the legislature that represents the public. It may regulate and change these public rights or take them away altogether to serve some paramount public interest. * * * The legislature having seen fit to devote the water of the lake to a public use for the benefit of the inhabitants of the metropolitan water district, it was in its power to deprive the general public of the right to go upon it with boats or otherwise, on the ground that a safe and advantageous use of the water for drinking and for other domestic purposes would be best promoted by terminating this former public right and putting the property in the control of the water board.

In accord with the above cases: *Auburn v. Water Power Co.* (38 Atl., 561 (Me.) [1897]); *City of Elgin v. Elgin Hydraulic Co.* (85 Ill. App., 182 [1899]).

The method by which the water becomes public is immaterial. In Massachusetts and Maine the result was accomplished by the ordinance of 1641-1847; in Washington by constitutional declaration; in Wisconsin by judicial interpretation, holding that all waters navigable in fact are public.^a Once establish that the water is public, it becomes subject to all legitimate public uses, irrespective of methods by which its public character was established.

A more significant case illustrating that where waters are public they may be used for any legitimate public purpose is the following:

Minneapolis Mill Co. v. Board of Water Commissioners of city of St. Paul (56 Minn., 485; 58 N. W., 33).

Plaintiff owned the right bank of the Mississippi River at the Falls of St. Anthony and built a wing dam into the river a few rods above the falls and utilized the water power created thereby. Another corporation, the St. Anthony Falls Water Power Company, owned the left bank of the river and also built a wing dam into the river, and the two dams were extended until they met at the thread of the stream. Each company leased the power so created to mills situated upon the banks of the stream below the falls. A large scope of country, 130 square miles, in Ramsey, Washington, Anoka, and Chisago counties, embracing White Bear, Bald Eagle, and other lakes, is drained by Rice Creek to and through Lake Baldwin and thence into the Mississippi River, 8 miles above St. Anthony Falls, and its waters add sensibly to the volume of water there.

The board of water commissioners of the city of St. Paul, acting under legislative authority, in 1889 established pumping works at Lake Baldwin, and have since taken therefrom for the use of the inhabitants of that city, situated 10 miles below the falls, about

^a The steps by which this result was reached are given *ante*, pp. 41-57.

fifteen hundred million gallons of water annually. The plaintiff brought this action to restrain the city from so taking the water and for damages. On the trial May 22, 1893, after plaintiff's evidence had been submitted, the court on motion of defendant dismissed the action on the merits. Plaintiff moved for a new trial. Being denied, it appealed.

Another similar action brought at the same time by the St. Anthony Falls Water Power Company against the same defendant, praying for the same relief, was tried at the same time and was disposed of in the same way. It also moved for a new trial. Being denied, it appealed. The two actions involve the same questions.

Collins, J., in denying a new trial, said:

There are a few well-settled principles which we regard as covering and controlling the facts before us, and a statement of these, with a construction of certain parts of the act under which defendant's board was authorized to obtain further and other sources of water supply, will dispose of these appeals.

(1) The plaintiffs are riparian owners on a navigable or public stream, and their rights as such owners are subordinate to public uses of the water in the stream. And their rights under their charters are, equally with their rights as riparian owners, subordinate to these public uses.

(2) There can be no doubt but that the public, through their representatives, have the right to apply these waters to such public uses without providing for or making compensation to riparian owners.

(3) The navigation of the stream is not the only public use to which these public waters may be thus applied. The right to draw from them a supply of water for the ordinary use of cities in their vicinity is such a public use, and has always been so recognized. At the present time it is one of the most important public rights, and is daily growing in importance as population increases. The fact that the cities, through boards of commissioners or officers whose functions are to manage this branch of the municipal government, charge consumers for water used by them, as a means for paying the cost and expenses of maintaining and operating the plant, or that such consumers use the water for their domestic and such other purposes as water is ordinarily furnished by city waterworks, does not affect the real character of the use, or deprive it of its public nature.

(4) In thus taking water from navigable streams or lakes for such ordinary public uses, the power of the State is not limited or controlled by the rules which obtain between riparian owners as to the diversion from, and its return to, its natural channels. Once conceding that the taking is for a public use, and the above proposition naturally follows.

Turning now to the provisions of defendant's charter, Laws 1885, chapter 110, it will be seen that the board was not limited to public waters as the sources of its contemplated additional supplies. It was authorized to appropriate private waters for the purpose, and hence the provisions of the act which provide for the ascertaining of, and making compensation for, damages caused by a diversion of water must be construed as applying solely to cases where the board took private property by using or diverting merely *private waters*. Inasmuch as the State itself could use the waters in question, as against the plaintiffs, without compensation, it would require very clear language to that effect to justify the conclusion that the legislature intended to impose on respondent board the burden of paying plaintiffs for what, as against the public, they did not own. If the right granted by the legislature had been exclusively to divert waters from a certain specified body of public water, such as one of the "great" ponds of Massachusetts, referred to in the cases cited from the reports of that State, so that the provisions in Laws 1885, chapter 110, relating to compensation could not apply to anything else—to the owners of private waters, for instance—the construction contended for by appellants that it was intended they should be compensated in case damages resulted might arise by implication.

The case was carried by writ of error to the United States Supreme Court (168 U. S., 349), where it was claimed that the decision of the state court was wrong because: (1) It deprived them of their property without due process of law; (2) or if the State originally had the right to divert the water, it had surrendered such right to the plaintiff in error; (3) that the decision was a radical change from the previous

decisions of the court recognizing plaintiff's rights of property and therefore the court should refuse to follow the last decision; (4) the decision impaired the obligation of the contract contained in the plaintiff's character by which it obtained the right to the full flow of the stream for power purposes.

As to (1) the court holds that by the law of Minnesota, which must control, the right to use the water for power purposes is subordinate to the use of the water for other public purposes and therefore no property of plaintiff was taken.

As to (2) and (4) the charters do not grant an irrevocable right to use all the water for power (even assuming the State could make such a grant).

As to (3) the decisions of Minnesota up to the time of the decision complained of had not recognized in a riparian owner the right to to use all the water flowing past his land for power to the exclusion of the public.

Commenting on (3) the court said (p. 371):

Whatever may be the rights of the plaintiffs in error under their charters or as the riparian owners of land to build and maintain their dams to the center of the stream, there is no decision cited which holds that they are entitled to the use of all the water which would naturally flow past their lands and over their dams so constructed, nor has the state court decided that the only right of the State * * * is limited to the right of the State to control or use the bed of the stream and the waters therein for purposes of navigation only. That limitation has never been placed upon the State with reference to the point here in question.

Commenting on the claim that the State had granted in the charters of plaintiffs in error the right to use all the water flowing past their lands and that the decision of the court was an impairment of the obligation of contract, the court said (p. 371):

We think this contention can not be maintained. We are of opinion that the true construction of these territorial charters does not give such contract rights as are claimed by the plaintiffs in error. They were grants of power to the respective companies, under which they were licensed to build their dams out into the river for the purpose of utilizing the power, and of using the water that flowed down the river. These grants were in legal effect subject at all times to the paramount right of the State as trustee for the public to divert a portion of the waters for public uses, and they were also subject to the rights in regard to navigation and commerce existing in the General Government under the Constitution of the United States. (See also upon this subject *Watuppa, etc., Co. v. Fall River*, 147 Mass., 548; *City of Auburn v. Union Waterpower Co.*, 38 Atl. Rep., 561, Supreme Ct. of Me., Oct., 1897.) There was no contract by virtue of these charters that the companies should always and for all time be entitled to all the natural flow of the water in the river without regard to the right of the State, as above mentioned. The claim made by the companies seems to us most extravagant. The State or any particular subdivision thereof, acting under its authority, would, if these claims were valid, be forever thereafter prevented from using any portion of the waters of the river for any public purpose unless compensation for such use were first made these plaintiffs. This construction of the meaning of the charters assumes the power of a territorial or state legislature to bind future legislatures in dealing with these public rights, and it prevents the latter from providing for the use of any portion of the waters for public purposes of the most important character without first making compensation to the plaintiffs for that use. If we should assume the validity of an act of the legislature of such a character (which, under the decision of this court in *Illinois Central Railroad v. Illinois*, 146 U. S., 387, is at least doubtful), it is clear that we ought not to adopt a construction leading to that result unless the legislative act be plain and beyond all doubt. We are of the opinion that these particular charters of the plaintiffs are not to be thus construed. The sections of the acts which are material upon this point simply authorize the companies to maintain their dams and sluices and permit them to construct and maintain other dams, etc., for the purpose of manufacturing, or for improving any water power owned or possessed by the companies, in such manner or to such extent as shall be authorized by the directors. But there is no language in the acts pro-

viding that the companies shall thereafter and always have the right to the use of all the natural flow of the water down the river. Nor is such a right a necessary and legal consequence of the language used. They may have acquired by these acts the right to build dams, etc., and the right to use such water as in fact from time to time should flow down to their dam, but there is nothing in the language of the charters showing or implying that it was the intention of the State to grant to these parties the rights now claimed by them. It is difficult to believe that a legislature would ever grant to individuals or companies rights of that nature, even if it be assumed it had the power. It was proper and in accordance with a wise public policy to grant a privilege to these companies to build dams, etc., as stated in the charters, and to permit them, by virtue of the dams and sluices, to use the water that in fact and from time to time might come down the river, but it can not be supposed that the legislature meant by any grant of this kind to warrant that for all future time no part of the water that might otherwise naturally flow down the river should ever be used under the authority of the State for any public purpose without compensating the plaintiffs for that diversion.

As indicating that navigable waters in Wisconsin are public, not only for navigation, but for other public uses, the case of *Willow River Club v. Wade* (100 Wis., 86), already noticed and commented upon, should be further examined. The case dealt with a small non-meandered stream navigable in fact. The plaintiff owned both banks of the stream, and hence the soil under it. The defendant entered upon the stream from a highway and by means of a boat went in front of the plaintiff's premises and from the boat caught fish. This was an action of trespass for damages for taking the fish. As previously pointed out (*ante*, p. 21), the right to take fish on a private stream belonged exclusively at common law to the riparian proprietor and was a valuable property right. If, as is contended, the navigable rivers of Wisconsin are private, subject merely to an easement of navigation in the public, then the right of fishery should be in the riparian owner. The court held, however, that such right was in the public. It has been said of this decision that the public right of fishing was recognized merely as an incident to the public right to navigate. In England where the public has an easement of navigation on private streams, it has never been held that this easement carries with it the right to take fish. It is difficult to see why the enjoyment of the right to navigate should include the right to take the fish. The last part of the opinion of the court appears to put the public right upon an independent basis and not as an incident to navigation. The court refers to Laws of 1893, chapter 307, section 20, and quotes as follows:

In this State the legislature has expressly declared that "all fish in the public waters of the State of Wisconsin are hereby declared to be the property of the State and may be taken for the use of the individual, and become his property at any time and in any manner not prohibited by the laws of this State." Public navigable streams are certainly "public waters" within the meaning of that act. Since the defendant kept within the banks of the river, * * * within the limits of the public highway, * * * his fishing was nothing more than the exercise of a right common to the public.

The concurring opinion of Marshall, J., in which Bardeen, J., joins, shows very clearly that he does not regard the right as a mere incident to navigation.

I concur with the decision of the court, but regard the opinion of the chief justice as being so framed as to lead to the belief that the common right of fishing in navigable streams in this State is a mere incident to the right of navigation, and that defendant is not liable because he was navigating the stream in a boat at the time of the act complained of; in short, that he was where he had a right to be in the exercise of the right of navigation, and therefore that he was not a trespasser upon the plaintiff's

lands. In my judgment the right of fishing in navigable waters is common to all, and exercisable, so far as it can be done without trespass on the banks thereof, whether the person exercising such right be at the time navigating the stream in a boat or otherwise floating upon the surface of the water, or traveling upon the bed in the shallows, or anywhere in any manner, between the lines of ordinary high-water mark.

The important use to which the public waters of the State have been put until recent years related to the lumbering industry, and on the smaller navigable rivers this has been almost the sole use. Our court has gone to great lengths in upholding the navigable quality of streams, that they might be made to serve as useful industrial agencies. (*Falls Mfg. Co. v. Oconto River Improvement Co.*, 87 Wis., 134.) Corporations have been created and given vast powers to straighten and deepen channels of rivers, remove obstructions therefrom, erect structures therein, and to close up tributary streams and sloughs. (*Conn Co. v. Eldred*, 74 Wis., 655; *Black River, etc., Co. v. La Crosse, etc., Co.*, 54 Wis., 659.) To promote this public use of navigable waters the rights of the riparian owner have, if not ruthlessly, at least vigorously, been subordinated to the paramount use. His right of access, regarded as a valuable right of property in other States, has been taken away without compensation. (*Black River Imp. Co. v. La Crosse, etc., Co.*, *supra*; *Cohn v. Boom Co.*, 47 Wis., 314.) The water power of mill dams has been seriously impaired without compensation. (*Falls Mfg. Co. v. Oconto, etc., Co.*, *supra*.) He has been denied the right to use the water in front of his land to float his logs to market, in order that a corporation to which had been granted the exclusive right to improve navigation might accomplish its work, and to this corporation he has been compelled to pay tribute for facilities which he might have procured independently by reason of his access to the waters. (*Cohn v. Boom Co.*, *supra*.) Upon individuals and corporations intrusted with this work have been conferred the powers of eminent domain.

All this work has been done to render available the water of the State for the public use of navigation, although in recent years the improvements have in reality had more to do with the rendering available the waters for use to develop hydraulic power than to render them available for public use for navigation. The navigable waters, as has been repeatedly held, pertain to the State in its sovereign and governmental capacity; their use constitutes a common and collective right held for all legitimate public purposes. The scope of what constitutes a legitimate public purpose has never been exhaustively determined. The appropriation of water to develop power for the common or public use would seem to fall within the limits of legitimate public purposes, and the supreme court of this State has never held that it does not.

Compensation to Riparian Proprietors.

As in the improvement of waters to permit the public use of them for navigation, no compensation was necessary to the riparian proprietor so long as the work and its effects were confined within the banks of the stream, so in the improvement of waters to permit the public use of them for hydraulic power, no compensation to riparian owners is necessary so long as the work is confined within the banks; for any land appropriated or flooded outside of the banks belonging to riparian owners, compensation must be made under

the principles of eminent domain. (Stevens Point Boom Co. v. Reilly, 46 Wis., 237; Cohn v. Wausau Boom Co., 47 Wis., 314; Black River Imp. Co. v. La Crosse, etc. Co., 54 Wis., 659; Falls Mfg. Co. v. Oconto, etc. Co., 87 Wis., 134.)

This easement, or right of the public to regulate, control, and direct the flow of the navigable waters, to impede or accelerate such flow, to deepen the channel or to remove obstructions found in it, or to change the direction of the current from one bank of the stream to the other, or to make an entirely new channel, and, in short, to do anything within the banks of the stream itself which may be considered for the benefit and improvement of commerce and navigation, will be found to be a most extensive and absolute one. (Wisconsin River Imp. Co. v. Lyons, 30 Wis., 65.)

* * * The public has the right to improve, regulate, and control the bed of the stream and the flow of the waters therein in the interest of navigation and commerce. (Delaplaine v. C. & N. W. Ry. Co., 42 Wis., 214, 225.)

But the title of the riparian proprietor * * * is held in this State (Wisconsin) to be not only subject to the public right of navigation, but also to the right of the State to regulate the flow of the waters and to do anything within the banks which the interests of commerce require. (Gould on Waters, sec. 75.)

The Right to Improve Public Water for Hydraulic Power is a Franchise.

The right of the public to use waters for navigation is held by the State in its sovereign or governmental capacity. The work of rendering the waters fit for such public use is public, and were it not for constitutional restrictions upon the State, such work might be done directly. A grant from the State to individuals or corporations to erect dams or other structures in navigable rivers to render such waters available for the public use of navigation constitutes a franchise. Cohn v. Wausau Boom Co. (47 Wis., 314).

The existing grants of franchises to put obstructions in navigable streams in order to improve navigation are sustainable only on the ground that they serve a public purpose, viz, to render the water available for the public use of navigation, and that the grantees of such franchises are performing a public work; otherwise the grant of the power of eminent domain which accompanies many of these franchises is invalid. The State could not authorize an individual to obstruct the public stream for a private purpose. When the State consents to have a navigable stream obstructed it is not merely conserving its "easement of navigation." It is, through private individuals, promoting a public work and rendering more available a common or public right.

Likewise, the right of the public to use waters for hydraulic power in aid of any legitimate public purpose is held by the State in its sovereign and governmental capacity. In making the water available for this purpose the State may act through individuals or corporations. A grant from the State to individuals or corporations of the right to erect dams or other structures in navigable streams for the purpose of developing hydraulic power to be used for public purposes is a franchise, and is subject to all the characteristics and incidents of franchises in general.

In this connection should be noted the Ice Tax case. (Rossmiller v. State, 114 Wis., 169.) Here the court decided only that the State could not assert a proprietary interest in the water and charge for the ice formed therefrom. This was put upon the ground that the water was held by the State as *jus publicum*, a part of the community property which every citizen by virtue of his membership in the

community was entitled to enjoy free from any charge. The right of the riparian owner to participate in the enjoyment of the ice formed on a navigable lake is not by virtue of his riparian proprietorship, but by virtue of his membership in the community. He has no greater rights simply because he is a riparian owner than any other person. The objection to the tax in the ice case was that it laid tribute upon the enjoyment of the common property in its *natural* state. The court did not decide that the community property may not be developed by the State and rendered more available for use and when so developed that a charge may not be made to recompense for the improvement afforded. While the State could not charge for the right to navigate a navigable stream, it could exact a toll to meet the expenses of rendering the common highway more useful for travel. The State has no proprietary interest in the water nor in any uses to which the water may be put. If the water is used to develop power, this new use is common property, but the State may charge a reasonable sum to pay for the cost of rendering this use available and may prescribe regulations for the use of the common property. If the development is done by private parties under State authority, they may exact a charge for the improvement made. The booming and logging companies are familiar examples of individuals improving the navigation of streams and charging for the improved services rendered.

Cases Distinguished.

The following cases have been relied upon as settling that the public has no greater rights in streams and rivers than navigation, and fishing as an incident thereto. (Green Bay & Mississippi Canal Co. v. The Kaukauna Water Power Co., 70 Wis., 635 [1888]. Same case on appeal, 142 U. S., 254 [1891].) The material facts are briefly these: The act for the improvement of the Fox and Wisconsin rivers, approved August 8, 1848, created a board of public works to carry on such improvements, and provided in section 16 that—

When any lands, waters, or materials appropriated by the board to the use of said improvements shall belong to the State, such lands, waters, or materials, and so much of the adjoining land as may be available for hydraulic or commercial purposes shall be absolutely reserved to the State; and whenever a water power shall be created by reason of any dam erected or other improvements made on any of said rivers, such water power shall belong to the State subject to future action of the legislature.

The plaintiff became the owner of the surplus water power created by a dam which is a part of the work of improvement of Fox River. The defendants, who are riparian owners, cut through an embankment on the side of the pond created by the dam and constructed a canal for the purpose of taking water from such pond to operate mills. They constructed head gates in the canal, which, when closed, would stop the water as effectually as the embankment. The plaintiff filed a bill asking that the defendants be enjoined from drawing the water from the pond and be required to restore the embankment. In the Wisconsin supreme court, Lyon, J. (p. 649), said:

The controlling question in this case is, Has the defendant * * * the right to cut the embankment on lots 5 and 6 * * * and draw water from the pond made by the Kaukauna dam for the purpose of propelling machinery located on its canal below the dam?

The defendant contended:

(1) That it had a right to draw off the surplus water for power because the water power which was reserved by section 16 relates only to such power as was developed incident to the state land. The court held that in order to give the State complete control of improvement, it was necessary to take all the water power developed.

(2) If section 16 was construed to authorize the taking of all the water power, then it was "invalid as to the surplus water power over and above that required for the navigation of the river, for the reason that it is a taking of private property for private use" (p. 651).

The court held that it was impossible to make the improvement of navigation in a proper manner without creating some surplus water power, and the fact that such surplus power was used for private purposes did not destroy the public character of the main work, which was the improvement of navigation.

(3) That by locating the south end of the dam upon lot 5 and building an embankment thereon, and on lots 6 and 7, and appropriating the whole water power created by the dam, the State took the property of the owners of those lots, and that the laws of the State made no adequate provision for compensating them therefor. The court held that the act of 1848 which purported to provide compensation was invalid because it—

failed to give the landowner a right to institute condemnation proceedings under it to have his compensation determined, and if the State should institute such proceedings, the compensation when determined was by section 21 of the act made payable out of a fund appropriated to such improvement. By section 20 the record in the office of the register of deeds of the transcript of the award * * * operated to fix the fee simple of the premises condemned to the use of the embankment. This, without requiring the sum so awarded as compensation to be first paid. The history of the improvement * * * shows that improvement fund was a very uncertain source to rely upon for the payment of a debt charged upon it.

The court held, however, that these defects in the law had been cured by the federal act of March 3, 1875, whereby the United States undertook to pay for any property taken, and the method of ascertaining the compensation was that prescribed by the laws of Wisconsin in respect to lands taken by railroads.

(4) That the plaintiff had a prescriptive right to maintain the south half of the dam on lot 5. The court was of the opinion that the United States had the legal right to maintain the dam on lot 5 without regard to prescription, and therefore the question was immaterial. The plaintiff's claim—

is probably not well founded as to the additional embankment constructed from the old to the new dam; perhaps not as to the portion of the new dam on lot 5. * * * But, however the question of prescription should be decided, were it material, it seems quite clear that no statute of limitations has run against the right of the present owner of lot 5 to recover of the United States compensation for the portion of that lot taken for the improvement and for the injury to the lot caused thereby. * * * We suppose the right to compensation was not cut off until a prescriptive right to maintain the dam had matured by twenty years' adverse user.

Whatever compensation defendant is entitled to, adequate provision is made by the federal act of 1875.

Having decided the foregoing contentions against the defendant, the court held that the plaintiff was entitled to an injunction.

The only contentions made in the state court were (1) on the construction of section 16 as to whether it included all the water power

or only such as was originated in connection with the public land; (2) whether the taking of the water power was for a public or a private use; (3) if the taking was for a public use as an incident to improve navigation, whether the method of ascertaining and securing compensation was adequate; (4) whether there was a prescriptive right to maintain a dam on defendant's land. The argument of the counsel and the attention of the court were directed to these points only. Whether the defendant was entitled to use the water for power as against the public use of water for navigation was not before the court. The public work was the improvement of navigation. *Surplus* water power resulted. Was such surplus power a necessary incident to the public work, which could be disposed of for private purposes without affecting the public character of the entire work, and was the method of computing and securing the compensation adequate? It was *assumed* that the defendant was entitled to compensation for the surplus water power, but such an assumption, or even a positive statement to that effect, was not essential to the disposition of all the questions raised in the litigation, and was therefore dicta. Whatever the defendant's property rights were that had been taken, adequate methods of ascertaining and paying for them were provided by the act of 1875. Defendant never availed itself of that act, and there never was any adjudication awarding compensation for the water power thus taken.

From the foregoing it is apparent that anything in the opinion of the court to the effect that the riparian owner was entitled to compensation for his loss of water power is dicta.

It should be noticed, further, that the case deals only with a situation where *surplus* water power results as an incident to the improvement of navigation, which surplus was devoted to *private* uses; but suppose there had been no surplus water power; that all the water was needed for the public use of navigation or for other public purposes, the defendant would none the less be deprived of its water power. The court does not purport to decide that where all the water is needed for the public use of navigation or other legitimate public use, and a total appropriation for that use takes place, that the riparian owner is entitled to compensation for the loss of the right to use the water for power. There was, in fact, in this case more water than was needed for navigation or for any other public purpose, and the power resulted from this surplus of water. If there had been no surplus there would have been no power. Even granting, for the sake of argument merely, that the court could on the issues presented have decided that the riparian owner was entitled to compensation for the loss of water power, the decision goes no further than to recognize a right to compensation for so much of the water or such use thereof as was not necessary for the public use of navigation and which surplus was turned to private uses. In other words, the court does not decide that in the exercise of the public right of use of all the water for navigation, compensation must be made to the riparian owners for the loss of the use of the water for power. Nor does the court decide that if the surplus had been used for public purposes compensation would have been necessary to the riparian owner. The public use of all the water for navigation or for other legitimate public purposes did not in this case come into conflict with the private use of it for power. If

the case does, as is contended, decide that the riparian owner is entitled to compensation for the loss of water power as against the public making use of the stream for navigation, then it decides too much, and is inconsistent with the conceded proposition that the public right of use extends at least to navigation; for if the public has the right to use the water for navigation, and this right is paramount to the private use of the water, the public should not be compelled to pay the riparian owner for damages caused by the public in pursuing its conceded right.

The scope of the decision on appeal to the Supreme Court of the United States is no broader than the decision in the state court. Mr. Justice Brown says (269):

The only question involved in this case proper for us to consider is whether the act of the legislature of Wisconsin of August 8, 1848, reserved to the State the water power created by the erection of the dam over the Fox River, as construed by the supreme court of the State, and the proceeding thereunder, operated to deprive the plaintiffs in error of their property without due process of law.

The question before the court was not what constitutes property, but whether the process by which the property, whatever it may consist of, was taken was *due process*.

The act of the legislature of Wisconsin of August 8, 1848, in so far as it provided that the water power created by the dam erected, or other improvements made on the river, should belong to the State, is claimed to be invalid upon the ground, first, that it purported to take private property for a private purpose; and, second, that if it were held to be the taking of private property for a public purpose, it was void under the constitution of the State, and not due process of law, because the act did not provide a method of ascertaining and making compensation for the property so taken. Practically the only question is whether this act was valid in so far as it authorized the State to take and appropriate the water power in question.

In other words, whether the act was invalid because it was a taking of private property for private use, or if for a public use, because it did not provide a method of ascertaining and making compensation for the property so taken. If either ground was established, there was a taking of property without due process of law, for due process requires that the taking be for a public purpose and that the method of ascertaining and securing the compensation provide that the party whose property is concerned shall have the right to institute proceedings to determine his compensation and that his compensation shall be paid or secured in advance of the taking. On pages 272-276 the opinion discusses whether the purpose of the taking is public or private. The remaining 6 pages of the opinion are devoted to considering the defects in the act of 1848, whether these defects were cured by the federal act of 1875, whether the canal company or the Federal Government should pay for the water power, and whether the statutory remedy superseded the common-law remedy.

This case was decided in 1891. If it stands for the proposition that the water power is riparian property which must be paid for if taken or destroyed by the exercise of the public right of navigation, it is inconsistent with the later cases, viz, *The Falls Mfg. Co. v. Oconto, etc., Co.*, *supra*, decided in 1894, and *Scranton v. Wheeler, supra*, decided in 1900. In the first case the plaintiffs' water power was seriously impaired without compensation because of the improvement of the stream for navigation. The court confirms *Cohn v. Wausau Boom Co.*, *supra* (1879), and *Black River Imp. Co. v. La Crosse, etc.*,

Co. (1882), where the riparian right of access was destroyed by reason of the public use of the stream. In *Scranton v. Wheeler* the plaintiff's right of access in St. Marys River, the bed of which by the law of Michigan was vested in him as riparian owner, was destroyed by the public work of improving the stream for navigation.

State v. Carpenter (68 Wis., 165 [1887]).

Bill or information by the attorney-general against defendant praying for an injunction restraining him from driving piles within the channel of Rock River and building thereon, which structure will cause great public inconvenience, mischief, and damage, and will interrupt and prevent the free use of the stream for navigation.

A preliminary injunction was issued by a court commissioner. This was dissolved by the circuit court. From the order dissolving an appeal was taken.

The court said:

It appears that the building so threatened to be constructed will occupy that portion of a lot in the city of Janesville, within said river, belonging to said defendant by conveyance of the owner of the lot, and situated between two bridges over said river, built upon piles, and without draw or swing and within 40 rods of each other, and in the vicinity of a building in the center of said river; that dams and bridges span said river within said city in many places, which prevent the use of said river for navigation, and many buildings have been built out into said river from adjacent lots by the owners thereof, and that such obstructions have existed for a great many years; and that practically and in fact said river has not been and could not be used for navigation, and that there has been no necessity or need for such a use of said river during a very long time past; and that the construction of said building would not materially obstruct or abridge such use if required, because a sufficient channel and space of said river would thereafter remain for such purpose. It does not appear that the public or anyone needs or requires, or that any exigency demands, the use of said river within said city for the legitimate purposes of navigation at this time.

These facts, which sufficiently appear in the record, would seem to negative the allegations of the complaint that said building would "cause great public inconvenience, mischief, and damage," and "great, irreparable, and permanent injury," by the interruption of the navigation of said river. * * * When anyone in good faith shall have the means of using this river for the legitimate purposes of navigation, and shall desire to use the same for such purposes, it will be time enough for him or the attorney-general to complain; and the courts of law will afford, in such an exigency, an ample remedy.

Janesville v. Carpenter (77 Wis., 288).

Bill to enjoin defendant from building or continuing piers or piles driven in the bed of Rock River within the limits of his property line. The complaint stated no damages to either party by the erection. It was obscure, defective, and speculative. The Janesville Cotton Mills did not allege any real injury to its water power.

So far as the action was a bill in equity to enjoin the commission of a tort or the creation of a nuisance the court held the bill was defective; that it was an anomalous action; that the—

action does not involve any question of obstruction or injury to navigation, or of injury to any public right. * * * The complaint does not show that the proposed building would be a public or private nuisance. * * * It is a private, and not a public action.

Reliance was placed upon chapter 423, Laws of 1887, which in terms purports to give a cause of action for putting obstructions in Rock River.

It shall be unlawful and *presumptively* injurious and dangerous to persons and property to drive *piles*, build piers, cribs, or other structures, * * * in Rock River *within the limits of the county of Rock*, and the doing of any such act *shall be enjoined* at the suit of any *resident taxpayer without proof* that any injury or danger has been or will be caused by reason of such act.

The italics are not in the act, and are used to save comment. Section 2 is especially appropriate to this action, and is as follows:

The doing of any *such act shall also be enjoined* at the suit of any owner or lessee of the right to use water of said river to operate any mill or factory *within said county*, without proof of any further fact than that such act will cause the water of said river to rise or set back, *to some extent*, at the place where the water used to operate such mill or factory is discharged into said river.

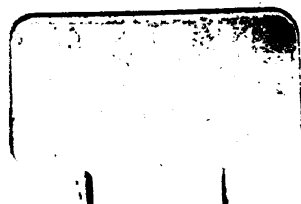
The court holds the statute unconstitutional on a variety of grounds:

- (1) Deprivation of property;
- (2) denial of equal protection of laws;
- (3) usurpation by the legislature of judicial functions.

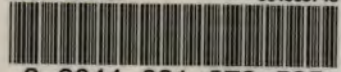
The statute attempted to compel the court, at the suit of a private party to enjoin the use by a riparian proprietor of the bed of a stream, irrespective of whether such use invaded any public or private right. Such a statute was clearly unconstitutional. The case in no way involves a discussion or decision on the extent of public rights in navigable streams.







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